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

Citation: *F. K. v. Minister of Employment and Social Development*, 2017 SSTADIS 403

Tribunal File Number: AD-17-89

BETWEEN:

F. K.

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: August 11, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated November 7, 2016. The General Division had earlier conducted a hearing by videoconference and determined that the Applicant was ineligible for the disability benefit under the *Canada Pension Plan* (CPP), because her disability was not "severe" prior to the minimum qualifying period (MQP), which ended on December 31, 2011.

[2] On February 1, 2017, within the specified time limitation, the Applicant's representative submitted an application requesting leave to appeal to the Appeal Division.

THE LAW

Canada Pension Plan

[3] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) be under 65 years of age;

(b) not be in receipt of the CPP retirement pension;

(c) be disabled; and

(d) have made valid contributions to the CPP for not less than the MQP.

[4] Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

Department of Employment and Social Development Act

[5] 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.

[6] 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.

[7] 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.

[8] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada.*[1] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[9] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for an 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.

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[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

ISSUE

[10] For this application to succeed, the Appeal Division must be satisfied that it has a reasonable chance of success.

SUBMISSIONS

[11] The Applicant's representative submitted a brief containing numerous detailed criticisms of the General Division's decision, which I have summarized and categorized as follows:

Erroneous Findings of Fact

[12] The Applicant alleges that the General Division based its decision on the following erroneous findings of fact, which it made in a perverse or capricious manner or without regard for the material before it:

- In paragraph 43 of its decision, the General Division found that "no serious pathology" had been demonstrated in four imaging reports. The Applicant insists that the cited reports do, in fact, show that she suffers from a "serious pathology," as does the fact that she underwent left shoulder surgery in November 2011. The Applicant also submits that the General Division erred in applying a test of "serious pathology" in assessing her disability.
- In paragraph 43, the General Division wrote: "Dr. Mor stated that the Appellant was not considered to be substantially unable to engage in the housekeeping and home maintenance services she engaged in prior to her accident." In fact, Dr. Mor's Insurer's Examination Psychology Assessment report, dated January 17, 2012 came to a conclusion that was significantly different from the General Division's characterization of it.
- In paragraph 43, the General Division wrote that Dr. Gagnon and Dr. Kaplan found that the Applicant had made tremendous strides in managing her mood and panic symptoms. In fact, the Kaplan-Gagnon report dated August 10, 2012 states, "Ms. F. K. has made a tremendous stride in recognizing that her body does not permit her to do as much activity during the day."

- In paragraph 44, the General Division wrote that Dr. Ghouse found the Applicant was "not restricted in range of motion of her neck, shoulders and back to the extent that all work activity is precluded." In fact, Dr. Ghouse's May 16, 2011 physiatry assessment report did not make such a conclusion. The General Division also claimed that the report did not make any treatment recommendations, but Dr. Ghouse, who was commissioned by the Applicant's insurer to perform an independent medical examination, was not mandated to address this issue.

- In paragraph 45, the General Division concluded that the Applicant could not be considered disabled from work from a psychiatric viewpoint. In doing so, it relied on a discharge report from the Chronic Pain Management Unit, in which the Applicant was quoted as saying that she had "more control" over her bad thoughts and anger, fewer panic attacks and less depression. However, the General Division took these statements, which did not represent the opinions of a physician, out of context; nowhere in the May 27, 2014 discharge report does it say that the Applicant was able to return to work.

- In paragraph 46, the General Division noted that the Applicant visited Dr. Ayeni regarding bilateral knee pain in 2014: "As this problem occurred well after the expiry of her MQP, The Tribunal did not consider her knee pain to be a barrier to returning to work." In fact, as documented in numerous medical documents that were made available to the General Division, the Applicant was complaining of a knee injury well before December 31, 2011.

- In paragraph 48, the General Division relied on the pain management program discharge report to find that the Applicant's psychiatric condition had "improved considerably" since her motor vehicle accident (MVA). In fact, the General Division should have placed more weight on the psychiatric evaluation of Dr. Suhail dated February 15, 2011, which found that, in addition to her functional limitations, the Applicant was suffering from significant depression, anxiety and stress, which prevented her from returning to work.

Errors of Law

[13] The Applicant alleges that, in making its decision, the General Division erred in law as follows:

- In paragraph 49, the General Division applied the wrong legal test when it found that the Applicant did not have a "severe medical condition" that would have precluded "all work" at the time of her MQP. Paragraph 42(2)(*a*) requires an applicant to show that he or she has a severe disability, not a "medical condition." In addition, an applicant must show that he or she is precluded only from substantially gainful employment, rather than "all" work.

- In paragraph 50, the General Division found that the Applicant failed to meet her obligation under *Inclima v. Canada*[3] to seek alternative employment. In doing so, the General Division misapplied the test, which requires that there first be a finding of residual work capacity. In this case, there was ample evidence that the Applicant had no such residual capacity.

ANALYSIS

[14] At this juncture, I will address only the arguments that, in my view, offer the Applicant her best chance of success on appeal.

The Ghouse Report

[15] I have reviewed the relevant passage from the decision against the source document and see an arguable case that the General Division mischaracterized the findings from Dr. Ghouse's assessment. It is clear that the General Division based its decision, in part, on the physiatrist's purported finding that the Applicant's range of motion was not restricted to preclude all forms of work:

> Dr. Ghouse, Physiatrist, reported in 2011, that the Appellant she [sic] is not restricted in range of motion of her neck, shoulders and back to the extent that all work activity is precluded especially when restrictions are mainly the result

[3] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

> of pain and not from structural or neurological impairment. Dr. Ghouse did not provide any treatment recommendations.

[16] While Dr. Ghouse, in his report dated May 16, 2011 (GD2-115), found that the Applicant was substantially unable to perform the essential tasks of her previous employment as a daycare operator, I do not see any instance where he declared that she was not precluded from *all* work. As the Applicant notes, this question was apparently beyond the purview of the report, which was commissioned by her insurer pursuant to her MVA benefits claim.

[17] The same might be said of the absence of treatment recommendations from Dr. Ghouse, which the General Division suggested was a sign that the Applicant's ailments were not so serious that they merited further attention. I think a case can be made that this implication ignored the context of the circumstances that brought the Applicant to Dr. Ghouse—a one-time medical-legal consultation for narrowly-defined non-therapeutic purposes.

[18] Finally, the General Division's decision conveyed the impression that Dr. Ghouse drew an inference about the Applicant's restrictions because they were "mainly the result of pain and not from structural or neurological impairment." I find it notable that neither this phrase nor anything like it appears in Dr. Ghouse's report, nor does it correspond to the substance of his opinion. It seems to originate instead from the Respondent's written submissions dated October 30, 2015, which attempt to offset the Ghouse report by contrasting it with competing evidence.

Knee Pain

[19] Paragraph 46 of the General Division's decision reads in its entirety:

> The Appellant visited Dr. Ayeni regarding bilateral knee pain in 2014. As this problem occurred well after the expiry of her MQP, The Tribunal did not consider her knee pain to be a barrier to returning to work.

[20] This passage suggests that the Applicant's knee pain and all evidence documenting it originated after the MQP. As the Applicant has specified several medical reports that show she was complaining of knee pain prior to December 31, 2011, I see an arguable case that the General Division may have based its decision on an erroneous finding of fact.

Test for Severity

[21] On its face, paragraph 49 suggests that the General Division misstated the test for severity. As the Applicant notes, paragraph 42(2)(*a*) requires claimants to demonstrate a "disability," a term that is at once more specific and more encompassing than "medical condition." More significantly, the CPP does not require claimants to show that they are precluded from "all" work, but from "any substantially gainful" occupation.

[22] I acknowledge that misstating a test does not necessarily mean one has in fact misapplied the test; it is useful to also examine other factors, including how a decision-maker actually treats the evidence and whether the misstatement is consistently repeated.

[23] In this case, the General Division correctly stated the test in paragraph 6 of its decision, but it misstated it a second time, in paragraph 49, referring to the leading case of *Klabouch v. Canada*[4] in a way that subtly altered its meaning. The General Division wrote:

> The determination of the severity of the disability is not premised upon a person's inability to perform his or her regular job, but rather on his or her inability to perform any work.

[24] This closely paraphrased a passage in *Klabouch* but omitted what, in my view, is an important qualifier in the original:

> Second, as a corollary to the above principle is the principle that the determination of the severity of the disability is not premised upon an applicant's inability to perform his regular job, but rather on his inability to perform any work, *i.e. "any substantially gainful occupation"* [my italics].

[25] In my view, the Applicant has made out an arguable case that the General Division erred in law by misstating and misapplying the test for severity to the Applicant's situation.

CONCLUSION

[26] I am granting leave to appeal on all grounds claimed by the Applicant. Should the parties choose to make further submissions, they are free to offer their views on whether a further hearing is required and, if so, what format is appropriate.

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[4] *Klabouch v. Canada (Social Development)*, 2008 FCA 33.

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

Member, Appeal Division