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

Citation: *M. W. v. Minister of Employment and Social Development*, 2017 SSTADIS 388

Tribunal File Number: AD-16-1153

BETWEEN:

M. W.

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: August 1, 2017

REASONS AND DECISION

INTRODUCTION

[1] On June 23, 2016, having found that the Applicant's disability had not been severe, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* was not payable. The Applicant filed an application for leave to appeal with the Tribunal's Appeal Division on September 26, 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 only grounds of appeal available to the Appeal Division are the following:

- the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- 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 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;

rather, she has to prove only that there is a reasonable chance of success, that is, "some arguable ground upon which the proposed appeal might succeed" (paragraph 12): *Osaj v. Canada (Attorney General)*, 2016 FC 115.

[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 the General Division erred in law in making its decision and that it based its decision on an erroneous finding of fact. She provided 16 paragraphs of information that she lists as her reasons for appeal. However, she does not indicate, with any specificity, what the errors alleged are. Some of these paragraphs provide a recapitulation of the General Division decision, while others articulate a concern. I have looked to all 16 paragraphs and have summarized the reasons for appeal. The Applicant submits the following:

1. Her minimum qualifying period (MQP) was December 31, 2016, and "since the hearing was before that date, the General Division had to decide whether the Appellant had a severe and prolonged disability on or before June 23, 2016, the date of the hearing";

2. She has suffered from various conditions, including idiopathic thrombocytopenia purpura (ITP) and chronic back pain, and further, as stated in paragraph 13 of the decision, she had been suffering from these conditions at the time of the application and at the time she had stopped working;

3. The General Division noted how there were discrepancies between the Applicant's questionnaire dated July 22, 2014, and her testimony, because her back pain had worsened over the previous year (paragraph 13 of the decision);

4. Three physician reports addressed the Applicant's condition, specifically:

a. a July 24, 2014, medical report that indicated that the Applicant suffered from chronic back pain for which she had been referred for back injections, acupuncture and physiotherapy (paragraph 18);

b. a November 15, 2015, medical report that stated that she was permanently disabled due to her multi-level degenerative disc disease with severe osteoporosis and compression fractures at L1-L3 and L4 and chronic back pain; and

c. an August 27, 2015, medical report that stated she could not be gainfully employed due to her conditions and that the physician confirmed that the Applicant was experiencing more disability with chronic pain;

5. The General Division noted how the Applicant was in apparent discomfort throughout the hearing and that her testimony was consistent with the medical reports (paragraph 29);

6. The General Division stated that the Applicant had not explained how her back discomfort impacted her work as a custodian (paragraph 29), which contradicted the evidence outlined by the Tribunal regarding her limitations in July 2014, which included limited standing, sitting, walking, weight carrying and painful bending (paragraph 14) and which have impacted the Applicant's work as a custodian;

7. The General Division stated that the Applicant left work because of her ITP and not due to her back pain, and the evidence does not support a severe disability from the back issues at the time she had left work (paragraph 33);

8. The General Division stated that the ITP issue gave rise to the Applicant leaving her job and, at the time, it was not suggested that her back was the cause of her inability to work (paragraph 34);

9. The General Division contradicted itself in paragraph 38 as it stated "[t]he Tribunal finds the Appellant's testimony to be straightforward and given in a direct manner. However it is not wholly consistent with the medical evidence." However, this contradicts the

Tribunal statement in paragraph 29, which indicated that her evidence was generally consistent with the medical reports;

10. The General Division erred when it provided a contradictory comment in respect of the Applicant's inability to work. Specifically, as indicated at paragraph 38, it determined that there was no report to indicate that the disability claimed produced symptoms to prevent the Applicant from being capable of seeking suitable employment, because the evidence suggested the Applicant had transferable skills. However, the Applicant argues, at paragraphs 19–22, the symptoms are outlined and resulted in a 10/10 pain score, a marked reduction in range of motion, an inability to provide treatment for her ITP issues and her family physician's statement that the Applicant was "unable to be gainfully employed in any remunerative position due to her conditions." Further, the Applicant submits that the General Division failed to account for its findings at paragraphs 30–31;

11. The General Division stated that the Applicant's main complaint was her back (paragraph 33). However, she did not give evidence that this was the reason she had left her job; rather it was her ITP condition. The Applicant submits that the question in law is not "whether the condition that made her leave work is severe and prolonged, which was the ITP, but rather whether or not she suffers from a severe and prolonged disability at the time of the MQP," or, in this case, the hearing date, because it is prior to the MQP. Further, that it is clear that it was the severe, chronic back pain that prevented her from returning to work and the General Division's decision to focus on whether that condition had forced the Applicant to stop working in May 2014 instead of on all the conditions suffered at the time of the hearing was an error in law;

12. The General Division failed to account for the medical evidence of Dr. Soderman on August 15, 2014, or Dr. Paul on February 17, 2015, which clearly outlined the severity of the Applicant's condition and her limitations when the General Division determined the Applicant had not made an effort to go back to work;

13. The General Division made an erroneous finding of fact when it found the Applicant's main argument for lack of work capacity was "discomfort" in her back, not the ITP, and that there was no objective report to suggest that she suffered from a severe disability. The Applicant submits that this failed to account for the medical evidence of Dr. Soderman in August 2014, where he indicated that the Applicant's pain was severe;

14. The General Division erred when it determined there was a conflict between the medical evidence of Dr. Sinclair, who had indicated that the Applicant was permanently disabled, and Dr. Paul, who had indicated that the Applicant should avoid work involving significant lifting and bending. The Applicant argues that this is not a conflict and that Dr. Paul was an internal medicine specialist focused on the ITP condition;

15. The General Division failed to adequately consider the *Villani v. Canada (Attorney General)*, 2001 FCA 248, criteria, as it failed to consider the Applicant's education, age and medical conditions in respect of sedentary work, given the Applicant's significant limitations with standing and walking. The Applicant refers to paragraph 41, indicating that the General Division failed to consider the family physician's opinion the Applicant was not able to seek employment due to her medical conditions;

16. The General Division erred when it failed to find that the disability was prolonged, as it was clear from the evidence that the conditions were permanent and therefore prolonged.

ANALYSIS

[9] The Applicant's submissions, in paragraph 8 above, do not clearly articulate errors of fact or of law permissible in subsection 58(1) of the DESDA. Some of the submissions are merely a reference to the decision. I will address all submissions for clarity and will link those submissions where it is submitted an error was made with respect to subsection 58(1) of the DESDA.

[10] In respect of the Applicant's submissions in paragraphs 8.1 to 8.5, as well as 8.7 and 8.8, above, there are no grounds of appeal identified. These submissions are merely summaries or recapitulations of the decision and do not indicate any errors of fact or of law:

- The submission at 8.1 is a summary of the issue before the General Division at paragraphs 6 and 7.
- The submission at 8.2 is a summary of paragraphs 11–13 of the decision.
- The submission at 8.3 is a summary of the General Division's observation within paragraph 13.
- The submission at 8.4 is a summary of the medical reports of July 24, 2014, November 15, 2015, and August 27, 2015.
- The submission at 8.5 is a recapitulation of paragraph 29 of the decision.
- The submission at 8.7 is a restatement of two sentences within paragraph 33 of the decision.
- The submission at 8.8 is a restatement of a sentence in paragraph 34 of the decision.

[11] In respect of the Applicant's submission in paragraph 8.10 above, that the General Division erred in law when it provided a contradictory comment concerning the Applicant's inability to work, I find this falls under paragraph 58(1)(*b*) of the DESDA. The Applicant is challenging the General Division's finding on her capacity to work where the General Division appears to have found a residual capacity to work without consideration of some relevant medical reports.

[12] In paragraph 38, the General Division noted that the reason the Applicant had left her work was due to complications with ITP. However, back pain that was not provided as a reason at that time, was noted to be the major reason at the time of the hearing. The General Division acknowledged the evidence presented and it indicated that there was "no report factually determining that the disability complained of has produced symptoms that are the major cause of or wholly prevents the Appellant from being able regularly to seek suitable employment."

The Applicant points to paragraphs 19 to 22 of the General Division's decision, which highlight various medical reports:

- In August 2015, Dr. Sinclair, family physician, indicated that the Applicant was permanently disabled and listed degenerative disc disease, severe osteoporosis, compression fractures and chronic pain. In his opinion, the Applicant was "unable to be gainfully employed in any remunerative position" (paragraph 19). The report also states that the Applicant is gradually experiencing more disability with chronic pain and is not likely to improve.

- On July 17, 2014, Dr. Romano reported mild scoliosis, demineralized vertebral bodies, a mild compression fracture and mild multi-level degenerative disc disease (paragraph 20).

- On October 27, 2014, Dr. Sinclair reported severe osteoporosis and compression fractures (paragraph 20).

- On March 13, 2015, Dr. Romano reported stable compression fractures of L1 and L4, mild scoliosis, and mild multi-level degenerative disc disease (paragraph 20).

- In August 2014, Dr. Soderman reported a pain score of 10/10 with a loss of normal lumbar lordosis and some stiffness. He also indicated that there were no gross focal motor or sensory deficits (paragraph 21). This reports also talks about a "marked reduction in range of motion to flexion and extension" and straight leg raising causing "some pain in the back" (paragraph 21).

- On December 15, 2015, due to a risk of bleeding, Dr. Soderman was unable to administer a neuroaxial block. This report also states that she received intravenous xylocaine "to help with the neuropathic component of the pain and reduce the frequency and intensity of the episodes."

[15] I note that the General Division has misstated the legal test, which could be an error of law. The test is not whether the Applicant has a medical condition that "[w]holly prevents her from being able to regularly seek suitable employment" (General Division decision, paragraph

38). The test is whether the Applicant is "incapable regularly of pursuing any substantially gainful occupation" as required in sub-paragraph 42(2)(*a*)(i) of the CPP. See *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, at paragraph 9.

[16] It appears that there was evidence of chronic pain and functional limitations that the General Division did not address in its analysis. Some of the evidence appears relevant and, arguably, should have been considered by the General Division (*D'Errico, supra,* paragraph 11). As a result, I find this ground has a reasonable chance of success on appeal.

[17] In *Mette v. Canada (Attorney General),* 2016 FCA 276, the Federal Court of Appeal indicated that it is not necessary for the Appeal Division to address all the grounds of appeal an applicant raises. In that case, Dawson J.A. stated, in reference to subsection 58(2) of the DESDA, that "[t]he provision does not require that individual grounds of appeal be dismissed." Because I found that there is an arguable case, I have not considered the remaining grounds of appeal that the Applicant has submitted.

CONCLUSION

[28] The Application is granted.

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

Peter Hourihan
Member, Appeal Division