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

Citation: *E. T. v. Minister of Employment and Social Development,* 2017 SSTADIS 395

Tribunal File Number: AD-17-114

BETWEEN:

E. T.

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 4, 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), which was issued on November 3, 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, 2006.

[2] On February 7, 2016, within the specified time limitation, the Applicant's representative submitted an application requesting leave to appeal to the Appeal Division. For this application to succeed, I must be satisfied that 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(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.

[5] 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.

[6] Some arguable ground upon which the proposed appeal might succeed is needed for leave to appeal 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]

[7] 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.

ISSUE

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

SUBMISSIONS

[9] The Applicant's representative submitted a 23-page brief with the application requesting leave for appeal, much of it recapitulating evidence and arguments that had already been presented before the General Division. That said, the Applicant's representative did make a number of specific allegations of errors, which I have summarized as follows:

- When adjudicating her claim, the General Division addressed each of the Applicant's many conditions separately, thereby failing to apply the "whole person";
- In assessing the Applicant's various conditions, the presiding General Division member relied on his personal opinions rather than the impartial medical evidence;

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

- By simultaneously accepting the Applicant's testimony that her disability had been severe since 2005 and finding that she was not disabled, thereby implying that her reported symptoms were untrue, the General Division contradicted itself;
- The General Division unreasonably took the Applicant's "insignificant" post-2005 earnings to be evidence, not of disability, but rather of capacity to perform substantially gainful employment.

[10] The Applicant also submitted a four-page chronological summary of post-2006 medical evidence and an eight-page affidavit sworn February 8, 2017, as well as 53 pages of medical reports and documents about her most recent employment.

ANALYSIS

Totality of Impairments

[11] The Applicant suggests that the General Division failed to assess all her impairments on her capacity to work. Although she does not frame it as such, the Applicant is pointing to an error of law, in which the guiding authority is *Bungay v. Canada*.[3] There, the Federal Court of Appeal wrote that a claimant's condition must be assessed in its totality: "All of the possible impairments of the claimant that affect employability are to be considered, not just the biggest impairments or the main impairment."

[12] The General Division's decision contains a comprehensive survey of the available medical evidence, but merely summarizing medical reports does not satisfy the obligation to assess the totality of a claimant's condition. Later, in its analysis proper, the General Division systematically discussed 17 of the Applicant's medical conditions under discrete headings, finding that none of them by themselves presented an impediment to work as of the MQP date. The General Division then capped its discussion of the Applicant's medical conditions as follows:

> Cumulative Assessment
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> The Tribunal has also considered all of the Appellant's conditions cumulatively and is not satisfied they resulted in a severe disability which prevented her

[3] *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

> regularly from pursuing any substantially gainful occupation, including lighter or part time work at the MQP.

[13] The General Division was clearly cognizant of the need to consider the Applicant's medical conditions collectively,[4] but it is not clear to me whether the rather perfunctory paragraph quoted above fulfills that obligation. While the General Division may have addressed the Applicant's many pathologies individually and in isolation from each other, I am uncertain whether it made a genuine effort to grapple with their *cumulative* impact on her capacity to maintain substantially gainful employment as of December 31, 2006.

[14] Having reviewed the General Division's decision against the evidence that was before it, I am convinced that this ground of appeal has a reasonable chance of success.

Personal Views

[15] The Applicant suggests that the General Division failed to observe a principle of natural justice by basing its decision on personal opinions rather than the evidence.

[16] An applicant has the right to expect a fair hearing with a full opportunity to present his or her case before an impartial decision-maker: *Baker v. Canada.*[5] In *Arthur v. Canada*,[6] the Federal Court of Appeal stated that an allegation of prejudice or bias against a tribunal is a serious matter. It cannot rest on mere suspicion, pure conjecture, insinuations or the applicant's mere impressions. It must be supported by material evidence demonstrating conduct that derogates from the standard.

[17] I have reviewed the decision against the evidentiary record, including the audio recording of the hearing, and I am unconvinced that the General Division departed from the prevailing standard. The Applicant may not agree with the General Division's conclusion, but I see nothing to indicate that it was reached with regard for anything but the evidence. The Applicant offers no specific examples of how the General Division injected personal opinion into its reasoning other than to allege that, by noting her technical schooling as a dressmaker, the General Division "assumed" that she was capable of working as dressmaker. In fact, my

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[4] Consistent with cases such as *Barata v. MHRD* (January 17, 2001), CP 15058 (PAB).

[5] *Baker* v. *Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817.

[6] *Arthur v. Canada (Attorney General)*, 2001 FCA 223.

reading of the decision suggests that the General Division made no assumptions or inferences from the Applicant's technical education (which is well-documented in the file) and that it based its decision, in part, on a finding that, while she did have residual capacity, she had not investigated work that was lighter and more sedentary than her previous cleaning jobs had been.

[18] 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 chooses to accept or disregard and decide on its weight. 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*,[7] the appellant's counsel identified a number of medical reports that she said the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. In refusing the application for judicial review, the Federal Court of Appeal held that:

> [A]ssigning 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] In employing its discretion to weigh the evidence and draw defensible conclusions from it, the General Division cannot fairly be said to have based its decision on personal opinions. I see no reasonable chance of success on this ground of appeal.

Credibility of Testimony

[20] In the application requesting leave to appeal, the Applicant's representative argued that her client's testimony was true and should have been taken at face value. She also wrote:

> The decision maker did not question credibility of Applicant's testimony regarding severe, prolonged and ongoing since 2005 disability, however the decision implies that the symptoms Applicant described in her sworn testimony cannot be true and should not and could not be totally disabling and such adjudication is unreasonable and contradictory in nature.

[21] Assessing the evidence, whether written or oral, is the very essence of the General Division's duty as trier of fact. The question is whether an assessment contravenes subsection

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

58(1) of the DESDA. In this case, the Applicant suggests that the General Division accepted the Applicant's testimony about the severity of her claimed disability, but I found nothing in the decision or the audio recording of the hearing to confirm this claim. In fact, the General Division made no finding at all on the Applicant's overall credibility. While the General Division did accept the Applicant's testimony on the specific issue of whether her post-MQP earnings were "substantially gainful" (paragraph 164), this cannot be equated with any wholesale acceptance that she was disabled according to the definition set out in paragraph 42(2)(*a*) of the CPP: the fact that she earned only modest amounts after the MQP does not logically mean she was disabled from all forms of substantially gainful work.

[22] I therefore do not see any "contradiction" in the General Division's findings, nor do I accept the Applicant's suggestion that the General Division was under an obligation to take her testimony at face value without weighing it against competing evidence such as medical reports.

[23] I am not satisfied that the appeal would have a reasonable chance of success on this particular ground.

Post-2005 Earnings

[24] The Applicant complains that the General Division unreasonably took the Applicant's "insignificant" post-2005 earnings to be evidence of capacity, but my reading of the decision leads me to a different conclusion.

[25] The Applicant devotes much of her submissions to minimizing her reported earnings from 2011 to 2013, but the decision indicates that the General Division actually agreed with her on this point:

> The Tribunal accepts the Appellant's testimony that her post MQP earnings were not substantially gainful. Even if the Tribunal were to accept that the Appellant earned the higher income in 2013 as set out in her Statement of Contribution, given the workplace accommodations she testified she received, the Tribunal is not satisfied that such earnings would be reflective of capacity on her part regularly to pursue a substantially gainful occupation in the competitive labour market.

[26] The General Division did not dismiss the appeal because the Applicant had substantially gainful post-MQP earnings but rather because it found that what income she did make suggested, in combination with the bulk of the medical evidence, that she had residual capacity

to maintain employment—if not the kind of strenuous work she was previously doing as a cleaner, then a lighter, less physically demanding job. This finding of residual capacity enabled the General Division to invoke the principle, set out in *Inclima v. Canada*,[8] obligating disability claimants to explore alternative forms of employment.

[27] I would not interfere with a finding of the General Division where it has weighed the evidence, taken into account the submissions of both parties and come to a conclusion that is defensible on the facts. As it has done so here, I see no arguable case on this ground.

Additional Material

[28] As noted, the application requesting leave to appeal came with a brief that, for the most part, repeats submissions that were already presented to the General Division. Indeed, much of its content specifically addresses arguments that the Respondent made in its written submissions prior to the hearing, and it contains links to web sites and other material that was not before General Division. Much of it comprises paragraph-by-paragraph annotations of the General Division decision, augmenting, qualifying and contextualizing previously submitted material.

[29] The Appeal Division has no mandate to rehear disability claims on their merits. While applicants are not required to prove the grounds of appeal at the leave stage, they must set out some rational basis for their submissions that falls into the grounds of appeal enumerated under subsection 58(1) of the DESDA. It is not sufficient for an applicant to merely express their continued conviction that their health conditions render them disabled within the meaning of the CPP, nor can an appeal succeed merely by repackaging submissions that were made, or could have been made, before the General Division. Instead, an Applicant must explain in specific detail how, in coming to its decision, the General Division failed to observe a principle of natural justice, committed an error in law or made an erroneous finding of fact. In order to proceed, those grounds must have a reasonable chance of success on appeal.

[30] As for the Applicant's affidavit, which was prepared after the General Division hearing, it constitutes new and inadmissible evidence, although I note that it too mirrors submissions that were already part of the record. The Appeal Division is not ordinarily a forum in which

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

additional evidence can be considered, given the constraints of subsection 58(1) of the DESDA, which do not give the Appeal Division any authority to make a decision based on the merits of the case. Once a hearing is concluded, there is a very limited basis upon which any new or additional information can be raised. An applicant could consider making an application to the General Division to rescind or amend its decision. However, 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*. Not only must an applicant meet strict deadlines and requirements to succeed in an application to rescind or amend, but he or she would also need to demonstrate that any new facts are material and that they could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

[31] While the General Division did not arrive at the conclusion the Applicant would have preferred, it is not my role to reassess the evidence but rather to determine whether the decision is defensible on the facts and the law. An appeal to the Appeal Division is not an opportunity for an applicant to re-argue their case and ask for a different outcome. My authority permits me to determine only whether any of the Applicant's reasons for appealing falls within the specified grounds of subsection 58(1) of the DESDA and whether any of them has a reasonable chance of success.

CONCLUSION

[32] I am granting leave to appeal on the sole ground that the General Division may have erred in law by failing to consider the cumulative effect of the Applicant's conditions in assessing the severity of her disability.

[33] 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.

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

Member, Appeal Division