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

Citation: *W. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 420

Tribunal File Number: AD-16-1166

BETWEEN:

W. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: August 18, 2017

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated June 30, 2016, which determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan*, as it found that her disability had not been "severe" on or before the end of her minimum qualifying period on July 31, 2014, the month before she began receiving a Canada Pension Plan retirement pension.

ISSUE

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

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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.

[4] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[5] The Applicant submits that the General Division erred in law in failing to assess her disability at the key date of July 31, 2014, and in failing to conduct a "real world" analysis. The Applicant further submits that the General Division based its decision on several erroneous finding of facts, in finding that:

a. she was able to sit comfortably throughout the hearing without considering the Applicant's evidence that she was able to tolerate sitting for the duration of the hearing because she had taken pain relief medication;

b. at paragraph 28, she was able to work. The Applicant argues that the General Division should have identified the type of work that she was able to perform, given her celiac disease and need to reduce her exposure to gluten.

[6] The Applicant asserts that the General Division failed to recognize that her condition is degenerative and that her symptoms are getting progressively worse.

[7] The Applicant provided copies of medical reports and records, along with the Respondent's adjudication summaries, with her application for leave to appeal.

July 31, 2014

[8] The Applicant argues that if she had been required to prove that she was disabled by July 31, 2014, then any medical evidence that arose after this date was irrelevant, and the General Division erred by considering it. The Applicant asserts that the General Division erroneously refused her application for a disability pension on the basis of her current medical status, rather than her status on July 31, 2014. She insists that, provided that she was disabled by July 31, 2014, she is entitled to a disability pension.

[9] The General Division did not conduct an extensive analysis of the medical evidence. Its analysis is set out at paragraphs 23 and 28. Although the General Division wrote about the Applicant's medical conditions in the present tense, it is clear from a review of its decision that the General Division had in fact primarily considered the medical evidence that had been prepared prior to July 31, 2014.

[10] Ostensibly, the General Division did not refer to any of the medical evidence that was dated after July 31, 2014, other than to write, "The remaining medical evidence is dated after the Appellant's [minimum qualifying period]," although, at paragraph 28, the General Division also referred to a medical opinion of a physiatrist, who believed that a functional capacity evaluation would find the Applicant at a "sedentary level of physical demand." The physiatrist had prepared this report in January 2016 (GD7-6). This was the only medical opinion prepared after the end of the minimum qualifying period that the General Division considered.

[11] The physiatrist who prepared the January 2016 report had been seeing the Applicant for several years. The physiatrist's findings and opinions set out in his 2016 report are generally consistent with his earlier findings and opinions as they relate to the Applicant's chronic pain condition and celiac disease, other than those relating to the Applicant's gender identity disorder, of which the physiatrist was initially unaware. The physiatrist also did not address the Applicant's previous complaints of pain and stiffness in his hands.

[12] The General Division considered the physiatrist's January 2016 medical opinion at paragraph 28, largely from the perspective of whether she had any vocational alternatives. However, it also found that the physiatrist's opinion had confirmed that, because he believed that a functional capacity evaluation would find the Applicant "at a sedentary level," she did not have a severe disability that rendered her incapable regularly of pursuing any substantially gainful occupation "on or before July 31, 2014 that continues to this day." The words "continues to this day" suggests that indeed the General Division also considered the Applicant's current medical condition.

[13] To be eligible for a Canada Pension Plan disability pension, the Applicant would have been required to prove that her disability was not only severe, but that it was also, by the end of her minimum qualifying period, prolonged, i.e. likely to be long continued and of indefinite duration or likely to result in death. In other words, the Applicant was also required to prove that her disability continued to be severe after the minimum qualifying period had passed. The General Division was unconvinced that her disability continued to

be severe and thus found that the Applicant did not meet the requirements under the *Canada Pension Plan.*

Villani

[14] The Applicant suggests that the General Division failed to conduct a "real world" analysis, as it failed to consider her circumstances. In particular, she claims that she has limited transferable skills and work experience. She wrote, "[the Applicant] is not capable of operating any computers and is limited in her abilities to communicate effectively with people in positions like sales and call center operations. [The Applicant] would not have had time to take a course of any type in this short period of time to increase her abilities."

[15] The General Division referred to the "real world" test articulated by the Federal Court of Appeal in *Villani*. Although the General Division did not conduct an extensive analysis, it is apparent that it considered the Applicant's particular circumstances. At paragraph 28, the General Division referred to the Applicant's education and work experience as factors that would assist her in finding alternate work.

[16] The Federal Court of Appeal stated that the assessment of an applicant's circumstances is a question of judgment with which one should be reluctant to interfere. Given that the General Division found that the Applicant's particular circumstances did not preclude her from regularly pursuing any substantially gainful occupation, despite the brevity of its analysis, I see no reason to interfere with the member's *Villani* assessment.

Prolonged sitting

[17] The Applicant claims that the General Division erred in suggesting that she is capable of sitting for prolonged periods of upwards of one hour, despite the fact that the hearing of the appeal occurred approximately two years after the end of her minimum qualifying period, and the fact that she had taken pain relief medication shortly before the hearing had started.

[18] The General Division set out its observation at paragraph 12 in its evidence section that the Applicant was able to sit for more than an hour without having to adjust her position. The General Division noted that this contradicted the information that the Applicant had provided in her questionnaire that she encountered difficulty with sitting for more than five minutes at a time.

[19] In its analysis, the General Division found that the Applicant was "able to do some small chores and activities on her own, and did not demonstrate significant limitations with sitting, standing, or walking." The General Division also found that a physiatrist was of the opinion that a functional capacity evaluation likely would find the Applicant "at a sedentary level of physical demand."

[20] It is unclear whether the General Division found that the Applicant "did not demonstrate significant limitations with sitting…" because she had sat for more than an hour during the hearing, because a physiatrist was of the opinion that a functional capacity evaluation would probably put her at a sedentary level of physical demand, or because of the Applicant's responses in her questionnaire. However, I find that the General Division did not err in finding that the Applicant is able to sit for prolonged periods, even if the Applicant has to rely on pain relief medication. Clearly, the General Division expected that the Applicant would have taken reasonable steps to enable her to improve her functionality and capacity, even if this involved taking pain relief medication.

[21] The Applicant suggests that her current presentation by no means reflects what her capacity was at the end of her minimum qualifying period, and that the General Division should have examined her capacity at July 31, 2014. The Applicant correctly notes that the General Division was required to examine her capacity at July 31, 2014.

[22] It is clear that when the General Division determined that the Applicant "did not demonstrate significant limitations with sitting," and suggested that she was therefore capable of regularly pursuing any substantially gainful occupation of a sedentary nature, this was in reference to her capacity at the end of the minimum qualifying period. Otherwise, had the General Division determined that the Applicant retained the requisite capacity for sedentary work, it would have been inconsistent and at complete odds for it to then find at

paragraph 28 of its decision that the Applicant "may not be able to work now due to her conditions."

Paragraph 28

[23] The Applicant contends that the General Division erred in requiring her to find "any work," as she claims that, at this point, she is incapable of performing any work.

[24] In fact, the General Division accepted that the Applicant may be unable not only to return to her former job, but that she may be unable to work now due to her conditions. If anything, the General Division required that the Applicant look for alternate work, but clearly it contemplated work that was suitable for her limitations, on or before July 31, 2014, rather than just "any work". The General Division placed a lot of weight on the physiatrist's opinion that, if the Applicant were to undergo a functional capacity evaluation, she likely would be placed at a "sedentary" level of physical demand (GD7-7).

Degenerative condition

[25] The Applicant argues that the General Division should have recognized that her condition has been progressively deteriorating over time.

[26] It is irrelevant whether the Applicant's condition is degenerative and has progressively deteriorated since the end of her minimum qualifying period, as the General Division was required to examine whether the Applicant could be found severely disabled by the end of her minimum qualifying period.

January 2016 report

[27] Although the physiatrist prepared his report after the end of the minimum qualifying period had passed, I note that he wrote the following:

> Certainly his physical functional capacity has diminished and there are a number of psychological stressors which would make it difficult for him to work in the public eye in the service sector.

> I think that because of his various physical impairments as listed beforehand he cannot return to his work as a licensed electrician. Because of other medical issues, return to alternate occupations is also not feasible. His functional and capacity would likely put him at a "sedentary" level of physical demand. However, a Functional Capacity Evaluation would be needed to confirm this objectively.

[28] The General Division referred to this evidence at paragraph 17. The General Division interpreted the physiatrist's opinion that the Applicant was likely at a "sedentary" level of physical demand to mean the Applicant was capable of sedentary work, but the General Division does not appear to have addressed or reconciled this with the physiatrist's opinion set out in the preceding sentence, that, because of other medical issues, "return to alternate occupations is also not feasible." While the Applicant may well have demonstrated a "sedentary" level of physical demand, it is clear from the physiatrist's opinion that the Applicant also had psychological stressors "and other medical issues" that appeared to rule out other alternate occupations. While the Applicant should have sought some clarification from her physiatrist in connection with this opinion, there is an arguable case that the physiatrist felt that, overall, because a return to alternate occupations was not feasible, that the Applicant lacked the capacity to regularly pursue a substantially gainful occupation, and that the General Division should have addressed this part of his report. For this reason, I am satisfied that the appeal has a reasonable chance of success.

EVIDENCE

[29] The Applicant provided copies of medical reports and records, along with the Respondent's adjudication summaries, with her application for leave to appeal. The General Division had copies of most of these records. Essentially, she is seeking a reassessment on the basis of the evidence before the General Division. However, a review or reassessment does not fall within any of the grounds of appeal under subsection 58(1) of the DESDA. As the Federal Court held in *Tracey*, it is not the Appeal Division's role to reassess the evidence or reweigh the factors that the General Division considered in assessing whether an applicant is severely disabled under the *Canada Pension Plan*.

[30] The General Division does not appear to have had a copy of the 2015 medical report prepared by the physiatrist (AD1-23 to AD1-25). It has now become well-established law that new evidence generally is not permitted on an appeal under section 58 of the DESDA. In *Canada (Attorney General) v. O'Keefe*, 2016 FC 503, at para. 28, Manson J. determined that:

> [u]nder sections 55 to 58 of the DESDA, the test for obtaining leave to appeal and the nature of the appeal has changed. Unlike an appeal before the former [Pension Appeals Board], which was *de novo*, an appeal to the [Social Security Tribunal – Appeal Division] does not allow for new evidence and is limited to the three grounds of appeal listed in section 58.

[31] In *Cvetkovski v. Canada (Attorney General)*, 2017 FC 193, at para. 31, Russell J. determined that "new evidence is not admissible except in limited situations […]" More recently, in *Glover v. Canada (Attorney General)*, 2017 FC 363, the Federal Court adopted and endorsed the reasons in *O'Keefe,* in concluding that the Appeal Division had not erred in refusing to consider new evidence in that case, in the context of the application for leave to appeal. The Court also noted that the DESDA makes provisions under section 66 for the General Division to rescind or amend a decision where new evidence is presented by way of application. However, there are strict deadlines and requirements under section 66. For instance, section 66 of the DESDA requires an applicant to demonstrate that the new fact is material and that it could not have been discovered at the time of the hearing with the exercise of reasonable diligence. Section 66 of the DESDA also requires that an application to rescind or amend be made within one year after the day on which a decision was communicated.

[32] Based on the facts before me, I am unconvinced that there are any compelling reasons why I should admit the physiatrist's report, as there is no indication that it falls into any of the exceptions. As the Federal Court has determined, generally, an appeal to the Appeal Division does not allow for new evidence.

CONCLUSION

[33] Given the considerations above, the application for leave to appeal is granted, although this decision of course is not determinative of whether the appeal itself will succeed.

[34] In accordance with subsection 58(5) of the DESDA, the application for leave to appeal hereby becomes the notice of appeal. Within 45 days after the date of this decision, the parties may: (a) file submissions with the Appeal Division; or (b) file a notice with the Appeal Division stating that they have no submissions to file. The parties may make submissions regarding the form the hearing of the appeal should take (e.g. by teleconference, videoconference, in person or on the basis of the parties' written submissions), together with submissions on the merits of the appeal.

Janet Lew
Member, Appeal Division