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

Citation: *V. S. v. Minister of Employment and Social Development,* 2017 SSTADIS 422

Tribunal File Number: AD-17-24

BETWEEN:

V. S.

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 18, 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 November 23, 2016. The General Division had earlier conducted a hearing by teleconference 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, 2003.

[2] On January 9, 2017, within the specified time limitation, the Applicant submitted an application requesting leave to appeal to the Appeal Division. Following a request for additional information, the Applicant made further submissions on August 8, 2017.

ISSUE

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

THE LAW

[4] 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.

[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] 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] 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]

[8] 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

[9] In her application requesting leave dated January 9, 2017, the Applicant wrote that she had suffered from a severe disability for a long time. She referred to Dr. Lai's report, which mentioned that her disability may have occurred before 2004. She said that while she had attempted to work for one week in 2004, it was no more than a trial, and it made her situation worse. She said that she was confused and nervous during the interview,[3] and that she forgets things very frequently.

[10] In a letter dated July 10, 2017, the Tribunal reminded the Applicant of the specific grounds of appeal permitted under subsection 58(1) of the DESDA and asked her to provide, within a reasonable timeframe, more detailed reasons for the request for leave to appeal. On August 8, 2017, she replied with a letter in which she made the following submissions:

- She has a severe and prolonged disability that has left her unable to perform any kind of work since 2003.

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[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No 1252 (QL).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[3] The Applicant is presumably referring to the October 12, 2016, oral hearing before the General Division.

- Service Canada has recognized that she has limitations, although it decided that her condition did not stop her from working. It referred to her family doctor's report documenting her skin condition. Although it has been improving under the care of a dermatologist, it is a chronic disease and is not gone forever.

- Service Canada also referred to her longstanding hearing and teeth grinding problems, which have been treated, unsuccessfully, by an otolaryngologist and dentist, respectively. She also suffers from dermatitis of both hands and other health issues, which prevent her from working as a hairdresser.

[11] The Applicant also enclosed two medical reports:

- A note from Dr. Vashti Persad, family physician, dated May 15, 2017;

- An x-ray of the right knee dated June 26, 2017.

ANALYSIS

Alleged Failure to Consider Medical Evidence

[12] For the most part, the Applicant's submissions 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 December 31, 2003.

[13] 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 implies that the General Division disregarded Dr. Lai's evidence, but my review of the decision indicates that it fully and accurately summarized the otolaryngologist's two reports in paragraphs 12 and 13 and addressed them in its analysis at paragraph 31:

> This report [Dr. Lai's report dated May 7, 2014] was prepared more than 10 years after the Appellant's MQP and is thus not of much assistance in helping the Tribunal understand the extent to which the Appellant's ear condition was affecting her functioning by December 31, 2003. The Tribunal recognizes that the Appellant told Dr. Lai during the May 2014 consultation that she had had the clicking noise in her left ear for over 10 years, which could mean that the Appellant's symptoms began before the end of her MQP. However, the Tribunal does not have any reports of consultations or investigations into this condition before May 2014, making it very difficult for the Tribunal to assess the extent to which this condition was impacting the Appellant's work capacity by December 31, 2003.

[14] This passage indicates that the General Division could find no independent evidence linking the Applicant's ear symptoms to the MQP and, even if there were, that would not necessarily lead to a finding that they constituted a severe and prolonged disability at that time. I see nothing in this view of the evidence that is "perverse," "capricious" or "without regard for the material."

[15] 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 had 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…

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

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

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 any particular item of medical evidence.

New Documents

[16] The Applicant's application for leave to appeal was accompanied by two medical reports that were prepared after the General Division had issued its decision.

[17] Given the constraints of subsection 58(1) of the DESDA, the Appeal Division does not ordinarily hear arguments on the merits of disability. 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.

CONCLUSION

[18] 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