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

Citation: *C. V. v. Minister of Employment and Social Development,* 2017 SSTADIS 437

Tribunal File Number: AD-16-1244

BETWEEN:

C. V.

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 29, 2017

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated September 28, 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 November 30, 2012.

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] Despite an invitation from the Social Security Tribunal that the Applicant cite any errors committed by the General Division under any of the grounds set out in subsection 58(1) of the DESDA, the Applicant failed to do so. Instead, the Applicant

recounted some of her medical and employment history. She had undergone knee replacement surgery in 2012 and again in 2013. While she returned to work after the first surgery, she remained in pain and relied on pain relief medication. She also used heating pads and took hot foot baths. She notes that she continues to experience progressively deteriorating pain in her legs, neck and lower back, and that she also faces physical limitations. She is unable to bend her knees and she finds it difficult to get in and out of vehicles or climb stairs. She also no longer takes baths, as she cannot get out of a bathtub. The Applicant explained that she had returned to work because she was raised to be stoic, and so she has tried to persevere, notwithstanding her pain. Even so, she required workplace accommodations.

[6] The Applicant notes that she also continues to experience headaches and dizzy spells, and that she has fallen on several occasions. She notes that she has gone to the hospital and seen physicians for investigations. She discovered that she had "broken ribs." One physician suspects that she may have a cyst or lesion on her brain. She is waiting for an appointment for diagnostic imaging. She also explained that, for reasons beyond her control, she has been unable to obtain medical records.

[7] Recently, the Applicant saw a foot doctor, whom diagnosed her with plantar fasciitis and provided her with exercises for her feet.

[8] None of these submissions raise any grounds of appeal under subsection 58(1) of the DESDA. Although the Applicant has not identified a reviewable error under subsection 58(1) of the DESDA, I will examine the medical evidence and compare it to the decision of the General Division. After all, the Federal Court has cautioned the Tribunal against mechanistically applying the language of section 58 of the DESDA when it performs its gatekeeping function: *Karadeolian v. Canada (Attorney General),* 2016 FC 615, at para. 10. The Federal Court wrote, "If important evidence has been arguably overlooked or possibly misconstrued, leave to appeal should ordinarily be granted notwithstanding the presence of technical deficiencies in the application for leave."

[9] The Federal Court has consistently maintained this position: *Griffin v. Canada (Attorney General)*, 2016 FC 874; *Joseph v. Canada (Attorney General)*, 2017 FC 391; *Hideq v. Canada (Attorney General)*, 2017 FC 439; and more recently in *Eby v. Canada (Attorney General)*, 2017 FC 468, in agreeing that the Appeal Division should review the underlying record and determine whether the decision failed to properly account for any of the evidence.

[10] I have reviewed the underlying record and have found no instance where the General Division decision failed to properly account for any of the evidence. The General Division addressed the Applicant's complaints of ongoing knee pain. The General Division also considered the Applicant's other medical complaints, though there was little in the way of supporting medical documentation. The General Division also reviewed the Applicant's employment history and found that she was engaged in a substantially gainful occupation after her minimum qualifying period had passed. My own review of the hearing file does not indicate that the General Division either overlooked or possibly misconstrued important evidence.

[11] Unlike its predecessor, the Pension Appeals Board, there is no rehearing before the Appeal Division, and an appeal is limited to the three grounds of appeal listed in section 58 of the DESDA. There is no role for the Appeal Division to reweigh or reassess the evidence. As the trier of fact, it is for the General Division to review and weigh the evidence and to reach a decision based on the facts and the law: *Simpson v. Canada (Attorney General)*, 2012 FCA 82. Unless a reviewable error under subsection 58(1) of the DESDA can be identified, decisions of the General Division are entitled to significant deference: *Hussein v. Canada (Attorney General),* 2016 FC 1417.

[12] The Applicant proposes to introduce new evidence, but it has now become well-established law that new evidence is not permitted on appeal under section 58 of the DESDA, unless it falls within any of the exceptions, such as whether it addresses any of the grounds of appeal. For instance, in *Tracey*, Roussel J. wrote that "[u]nder the current legislative framework however, the introduction of new evidence is no longer an independent ground of appeal (*Belo-Alves*, at para 108)."

[13] In *Canada (Attorney General) v. O'Keefe*, 2016 FC 503, at para. 28, Manson J. determined that:

> Under 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.

[14] In *Marcia v. Canada (Attorney General)*, 2016 FC 1367 at para. 34, McVeigh J. held that "[n]ew evidence is not permissible at the Appeal Division as it is limited to the grounds in subsection 58(1) and the appeal does not constitute a hearing *de novo*." And, in *Glover v. Canada (Attorney General)*, 2017 FC 363, the Federal Court adopted and endorsed the reasons in *O'Keefe* by ultimately 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.

[15] Based on the facts before me, I am unconvinced that there are any compelling reasons to consider the Applicant's proposed new evidence, 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.

[16] I have concluded that the Applicant has not raised any arguable grounds upon which the proposed appeal may succeed and I am therefore satisfied that the proposed appeal has no reasonable chance of success.

CONCLUSION

[17] For the foregoing reasons, the application for leave to appeal is refused.

Janet Lew
Member, Appeal Division