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

Citation: *L. R. v. Minister of Employment and Social Development*, 2017 SSTADIS 444

Tribunal File Number: AD-16-931

BETWEEN:

L. R.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shirley Netten

Date of Decision: September 1, 2017

Canada

REASONS AND DECISION

[1] A decision of the General Division of the Social Security Tribunal of Canada (Tribunal), dated April 14, 2016, confirmed that a disability pension under the *Canada Pension Plan* was not payable to the Applicant.

[2] The Applicant now requests leave to appeal the General Division decision to the Appeal Division of the Tribunal. Pursuant to s. 56(1) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Appeal Division is not automatic, but rather "may only be brought if leave to appeal is granted." The leave to appeal proceeding is thus a preliminary step to an appeal on the merits.

[3] As set out in s. 58(2) of the DESDA, leave to appeal is refused "if the Appeal Division is satisfied that the appeal has no reasonable chance of success." A reasonable chance of success means having some arguable ground upon which the proposed appeal may succeed: *Osaj v. Canada (Attorney General)*, 2016 FC 115; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41. The Applicant does not have to prove the case at the leave stage.

[4] The only grounds of appeal to the Appeal Division are those identified in s. 58(1) of the DESDA:

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.

[5] In her application, the Applicant (who is self-represented) asserts that the medical reports from her family physician and occupational therapist "were not given careful consideration" and requests "another set of eyes looking at them." This suggests a concern with the weighing of

evidence (which is within the province of the trier of fact), and does not clearly fall within one of the possible grounds of appeal outlined above. However, as noted by the Federal Court in *Karadeolian v. Canada (Attorney General)*, 2016 FC 615, the Appeal Division ought not to mechanistically apply the precise grounds of appeal when a self-represented party raises evidentiary concerns; the Appeal Division should compare the evidence to the decision under consideration and "if important evidence has been arguably overlooked or possibly misconstrued, leave to appeal should ordinarily be granted […]"

[6] Here, the General Division arguably misconstrued the evidence with respect to the Applicant's work attempts and her ability to work, raising the possibility that the decision was based upon erroneous findings of fact made without regard to the material before it. Paragraph 8 of the decision indicates that the Applicant stopped work in 2014, with no attempts to return to work, yet the file documentation suggests that the Applicant stopped working in October 2013, with several return to work attempts preceding and following that date. Paragraph 20 of the decision indicates that the family physician was the only medical professional who stated that the Applicant was incapable of working, yet the file documentation includes an occupational therapist's assessment (GD8-17) which concluded in September 2014 that the Applicant required assistance with independent living and a return to work was not suitable, and a psychiatrist's report (GD8-13) which stated that the Applicant "isn't fit for work" in July 2015 (though an ability to return to work was anticipated in the future, from a psychiatric perspective only). In addition, while the member did not make clear findings of fact with respect to the Applicant's functional limitations and her work capacity, she referenced limitations due to Raynaud's syndrome, asthma and anxiety (paragraph 24) with no discussion of the symptoms of extreme fatigue and weakness described by the family physician in July and November 2015 (GD8-5 and GD8-28).

[7] Accordingly, I am satisfied that there is an arguable ground upon which the proposed appeal may succeed. Leave to appeal is granted.

[8] I note, however, that I have not admitted into evidence the new documents submitted by the Applicant (the Member of Parliament's letter of June 24, 2016, and Dr. MacIntosh's letter of July 4, 2016), nor have I considered any new information (as opposed to argument) contained in the Applicant's hand-written submission of July 8, 2016. New evidence is generally not admitted at

the Appeal Division since the appeal does not constitute a hearing *de novo*: *Marcia v. Canada (Attorney General)*, 2016 FC 1367. The material that was not before the General Division in April 2016 can have no bearing on a claim that an error of fact or law was made by the General Division at that time. Moreover, the existence of new evidence is not an independent ground of appeal under the DESDA.

CONCLUSION

[9] The application for leave to appeal is granted.

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

Shirley Netten
Member, Appeal Division