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

Citation: *M. B. v. Minister of Employment and Social Development,* 2017 SSTADIS 452

Tribunal File Number: AD-17-54

BETWEEN:

M. B.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Peter Hourihan

Date of Decision: September 13, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On October 24, 2016, having found that the Applicant's disability had not been severe on or before her minimum qualifying period (MQP) of December 31, 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable.

ISSUE

[2] I must decide whether 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] According to subsection 58(1) of the DESDA, the only grounds of appeal available to the Appeal Division 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 that it made in a perverse or capricious manner or without regard for the material before it.

[5] Subsection 58(2) of the DESDA provides that leave to appeal is to be refused if the Appeal Division is satisfied the appeal has no reasonable chance of success.

[6] In determining whether leave to appeal should be granted, I am required to determine whether there is an arguable case. The Applicant does not have to prove the case at this stage;

she has to prove only that there is a reasonable chance of success, that is, “some arguable ground upon which the proposed appeal might succeed:” *Osaj v. Canada (Attorney General)*, 2016 FC 115 (paragraph 12). The Federal Court of Appeal concluded that the question of whether a party has an arguable case at law is akin to determining whether that party, legally, has a reasonable chance of success—*Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

SUBMISSIONS

[7] The Applicant submits that the General Division erred because it had neglected to take into consideration the totality of the evidence and material before it when it decided that she was not entitled to a disability pension. There were many medical reports where doctors were of the opinion that the Applicant was unable to work due to her condition.

[8] The Applicant submits that the General Division erred when it erroneously found that she had not followed all the suggested treatments.

[9] The Applicant submits that the General Division erred in when it failed to take into consideration *Villani v. Canada (Attorney General)*, 2001 FCA 248, specifically that the General Division decision (Decision) failed to take into consideration any reference to the “real world,” and that it failed to take into account the Applicant’s age, education level, language proficiency, and past work and life experience.

ANALYSIS

[10] In respect of the Applicant’s submissions that the General Division erred when it did not take into consideration the totality of the evidence and material before it, I find that this is a ground of appeal under paragraph 58(1)(*c*) of the DESDA.

[11] In respect of the Applicant’s submission that the General Division erred when it found that she had not followed all the suggested treatments, I find that this is a ground of appeal under paragraph 58(1)(*b*) of the DESDA, specifically an error in law.

[12] In respect of the Applicant’s submission that the General Division erred when it did not consider *Villani*, *supra*, I find this is a ground of appeal under paragraph 58(1)(*b*) of the DESDA.

Error of Law—Following Suggested Treatments

[13] The General Division referenced the Applicant's testimony in its evidence portion, where she had provided her background. It noted the initial injury and the treatment that she had received. Further, in addition to noting her work history, it noted the effect that—according to the Applicant—her injury has had on her, and she had described her limitations, both physically and mentally. At paragraphs 9–11, it takes note of the medications and various treatments that she described.

[14] The General Division also referenced the medical reports. In the evidence portion at paragraph 12, it highlights Dr. McEwan, cardiologist, who treated the Applicant when she had suffered her sudden onset injury on July 15, 2013, and who, upon follow-up on September 23, 2013, reported that the Applicant was within normal cardiac limits and that she was back at work. It also noted Dr. Miladinovic, family physician, who, on September 5, 2013, had advised that the Applicant should not work with chemicals.

[15] The General Division, at paragraph 14 of the Decision, references the various X-rays taken and other imaging conducted in 2013 and 2014, as well as where there was evidence of C6-7 disc herniation, severe compression of the left C7 nerve root and moderate compression of a left ventral lateral aspect of the spinal cord, and later a finding of chronic active left C7 radiculopathy with no evidence of a left CTS or ulnar neuropathy. It referenced, in detail, the findings and treatments of various doctors, including Drs. Dos Santos, Awan, Al-Omar, Mainprize, Bari, Alotaibi, Chatterjee, Flannery, Schacter and her family doctor, Dr. Miladinovic. Further, it referenced Drs. Antic and Savic, whom the Applicant had consulted in Bosnia and Herzegovina.

[16] The General Division notes at paragraph 20 that Dr. Miladinovic had referred the Applicant to Dr. Mainprize, neurosurgeon, who, on March 25, 2014, recommended conservative management and indicated that, while surgery was an option, the Applicant had decided not to proceed with surgery, as there was a 5–6% chance of an associated risk. On October 2, 2014, the Applicant saw Dr. Bari, neurosurgeon, who had been seeing her every three months since the beginning of 2014. He was of the opinion that surgery was not the best

option at that time, as an August 30, 2014, showed an improvement in the disc herniation and a decreased nerve root impingement (paragraph 21).

[17] Similarly, on January 22, 2015, the Applicant saw Dr. Alotaibi, neurosurgeon, who was also of the opinion that surgery was not the best option, given the significant improvement of the disc herniation, and given that her reflexes were normal on both sides and that there was no obvious muscle wasting (paragraph 22).

[18] The Applicant also saw Dr. Antic, neurosurgeon, in Bosnia and Herzegovina, on June 17, 2015. Dr. Anic was of the opinion that surgery had been indicated (paragraph 25). The Applicant also saw Dr. Schacter, neurosurgeon, who, on October 14, 2015, recommended an active exercise program, core muscle strengthening, yoga, acupuncture and cortisone injections (paragraph 26). An electrophysiological examination, conducted in Bosnia and Herzegovina by Dr. Savic, on July 11, 2016, indicated a chronic, proximal, slowly progressive, moderately severe, axon type, pluriradicular, compressive lesion, most severe at the C5-6 (paragraph 27).

[19] The General Division noted that on May 5, 2015, Dr. Miladinovic had completed a medical report for the CPP application for disability. She indicated that the Applicant was unable to work or concentrate, requiring help in her activities of daily living (paragraph 24). Dr. Miladinovic also commented on July 27, 2016, that the Applicant's condition had progressively deteriorated since 2013. She was of the opinion that the Applicant was compliant with the recommended treatment modalities and that she was unable to hold any meaningful employment "at this time."

[20] In its analysis of the evidence, the General Division considered the evidence. It summarizes this in paragraph 36 of the Decision. At paragraph 37, it notes that the Applicant had been compliant with the recommended treatment, and that she feels the conservative treatment was ineffective and that surgery may be her best option. It observed that the Applicant had sought consultations outside of Canada, as she felt that the treatment in Canada had been ineffective. She was advised that surgery had been indicated. However, by the date of the hearing, she had not followed up on those recommendations, and she remained frustrated with her treatment (paragraph 38).

[21] In respect of the Applicant's submission that the General Division found that she had not followed all the suggested treatments, I find that it has a reasonable chance of success on appeal. The Decision finding that the disability was not severe appears to be based in part on the determination that the Applicant had not pursued or complied with the surgery treatment recommended in Bosnia and Herzegovina.

[22] In paragraph 37 of the Decision, the General Division indicates that the medical records on file confirmed that the Applicant had been compliant with the medical treatment recommended for her. It then went on to qualify that statement. It observed that it was the Applicant who was of the opinion that the conservative treatment had been ineffective and that surgery may be an option, despite the fact that the Canadian neurosurgeons did not endorse it. The Applicant had travelled to Bosnia and Herzegovina for consultations and testing, as she was not satisfied with the treatment options that she had been following. The General Division observed that surgery, as recommended in Bosnia and Herzegovina, may result in treatment options for the Applicant.

[23] The General Division states at paragraph 41 that:

> […] although the [Applicant] has been compliant with treatment recommendations made for her in Canada, all treatment modalities have not been exhausted as she is yet to have consultations and surgery as recommended in Bosnia. This means while she has attended numerous treatment modalities it appears that not all treatment options have been complied with.

The General Division noted that it was the Applicant who had sought out this option because she felt that the treatment options in Canada had not been working, and it observed that she had not followed up further. She received a report from the physicians in Bosnia and Herzegovina with a recommendation. The General Division found that, although the recommending consultants resided outside of Canada, that did not excuse the Applicant from complying with recommended treatment. The Applicant voiced her own concern about how she felt that the recommended treatment plans were ineffective.

[24] *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211, held that the decider must consider whether the refusal of the treatment is unreasonable and, if so, he or she must consider what impact the refusal may have on the disability status.

[25] The General Division made no reference to *Lalonde*, nor was there any discussion of the reasonableness of failing to pursue the surgery treatment option and its impact. This may have constituted an error of law, and I find that there is an arguable case with a reasonable chance of success on appeal. *Joseph v. Canada (Attorney General)*, 2017 FC 391, at paragraph 43, cites *Griffin v. Canada (Attorney General)*, 2016 FC 874, at paragraph 20, stating: "[…] the Appeal Division should review the underlying record and determine whether the decision failed to properly account for any of the evidence."

[26] In *Mette v. Canada (Attorney General)*, 2016 FCA 276, the Federal Court of Appeal indicated that it is not necessary for the Appeal Division to address all the grounds of appeal that an applicant raises. In that case, Dawson J.A. stated, in reference to subsection 58(2) of the DESDA, that, "[t]he provision does not require that individual grounds of appeal be dismissed." Because I found that the Applicant has a reasonable chance of success on appeal in respect of her submission that the General Division erred in law when it erroneously determined that she had failed to follow all the recommended treatments, I have not considered the remaining grounds of appeal.

CONCLUSION

[27] The Application is granted.

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

Peter Hourihan
Member, Appeal Division