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

Citation: *M. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 466

Tribunal File Number: AD-17-203

BETWEEN:

M. M.

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: September 6, 2017

Canada

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated February 3, 2017. The General Division had previously conducted a hearing by videoconference and determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP) because her disability was not "severe" prior to her minimum qualifying period (MQP), which ended on December 31, 2013 or, alternatively, during her prorated period from January 1, 2014 to April 30, 2014.

[2] On March 7, 2017, within the specified time limitation, the Applicant's authorized representative submitted an application requesting leave to appeal to the Appeal Division.

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. 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 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.

[5] 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.

[6] 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]

[7] 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.

ISSUE

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

SUBMISSIONS

[9] In her application requesting leave to appeal, the Applicant alleged that the General Division erred in law and fact as follows:

(a) It failed to apply the principles of *Inclima v. Canada*,[3] by faulting her for turning down an offer of modified work from her employer. In fact, as the evidence shows, she was discharged from her job after her doctor specified multiple medical restrictions.

(b) It based its decision on a finding that the Applicant had unreasonably failed to explore multiple treatment modalities. In fact, she followed all recommended medical advice, stopping medications, as indicated in medical reports that were before the General Division, only because they caused negative side effects.

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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] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

[10] The Applicant also enclosed with her application requesting leave to appeal the following documents:

- Letter dated August 7, 2013, from S. S., Human Resources Manager of Ceva Logistics Inc.;
- Consent to release medical information to Ceva Logistics signed by the Applicant on August 29, 2013;
- Physical Guidelines Form completed by Dr. Julian Barrettara on August 29, 2013, for Ceva Logistics;
- Notice of Frustration of Employment from S. S. of Ceva Logistics dated September 27, 2013.

ANALYSIS

Attempt to Investigate Alternative Forms of Work

[11] The Applicant alleges that the General Division ignored or distorted evidence that demonstrated her effort to mitigate her impairments and remain employed. She submitted documents corroborating her testimony that she did not turn down an offer of modified work, but was instead discharged by her employer after her family doctor found her subject to restrictions. The General Division faulted her conduct where none was warranted.

[12] In my view, the Applicant has not presented an arguable case on this ground. I acknowledge that the General Division based its decision, at least in part, on what it found was the Applicant's failure to mitigate her impairments by pursuing suitable work:

> [43] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117). The Appellant last worked as a full-time IP clerk until she was involved in a motor vehicle accident in January 2012. When the Appellant inquired as to the availability of modified work following the cessation of benefits by her insurer, her employment was reportedly terminated when they could not offer modifications. There has been no effort on the part of the Appellant since that time to look for modified work or attempt any re-training after her termination from Ceva in 2013. While the Appellant may not be able to return to her previous full-time role which involved prolonged computer use while seated at

> a desk, she has failed to convince the Tribunal that she was incapable of obtaining or maintaining any substantially gainful employment as a result of her health condition at the time of her MQP.

[13] However, this passage indicates that the General Division did not "fault" the Applicant because she turned down an offer of modified duties—the General Division accepted the Applicant's evidence that no such offer was ever made—but because she made no subsequent attempt to search for suitable work after her employment with Ceva was terminated. The Applicant has submitted documents that appear to confirm her testimony that Ceva did not have any work available that would have accommodated her restrictions, but this evidence was never presented to the General Division and, given the strictures of subsection 58(1), I am prevented, as a member of the Appeal Division, from considering fresh evidence on its merits. As it happens, I do not see how the Ceva material would have changed the General Division's reasoning, since it found that the Applicant had made insufficient effort to investigate alternatives to clerical work.

[14] As held in *Simpson v. Canada*,[4] assigning weight to evidence is the province of the trier of fact, and the Appeal Division will not substitute its view of the probative value of evidence for that of the General Division, unless there are exceptional circumstances. In this case, having considered the Applicant's testimony, the General Division found that she had made little or no attempt to search for work beyond her last employer. This finding would appear to have a firm foundation in the facts, and I see no error that might qualify as perverse, capricious or at odds with the record. As such, I do not think that this ground would have a reasonable chance of success on appeal.

Refusal of Treatment

[15] The Applicant submits that the General Division made a finding of fact that was not supported by the evidence before it; specifically, it found that the Applicant had unreasonably failed to comply with medical advice. In the alternative, the Applicant submits that the General Division failed to properly assess why she could not comply with her doctors' recommendations.

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

[16] Again, I see no arguable case on this ground. It would have been one thing had the Applicant been able to show that the General Division ignored or mischaracterized her evidence that she had made reasonable attempts to regain her health and functionality, but her submissions acknowledge that it considered such evidence; it appears that her real concern is that the General Division did not draw from the evidence the conclusions that she wanted. Cases such as *Lalonde v. Canada* and *Bulger v. Canada*[5] oblige CPP disability applicants to comply with treatment recommendations, but they also require the trier of fact to consider the reasonableness of any non-compliance. Here, the General Division devoted considerable attention to the Applicant's treatments and whether she had good reason to refuse any of them:

> [38] Based on the evidence presented, there have been multiple treatment recommendations which have not been pursued by the Appellant. Even the physiotherapy that the Appellant did receive, according to Dr. Barrettara and Dr. Djuric, was inconsistent and quite limited. With respect to the Appellant's mild carpal tunnel syndrome, surgical intervention as well as night splinting and cortisone injections were recommended, yet there is no indication they were ever pursued. Dr. Toma made recommendations for multiple novel medications trials in early 2014, as well as facet and trigger point injections for the Appellant's pain, and again none of those options have been pursued. Dr. Toma also recommended that the Appellant consult with a shoulder surgeon, which has not been undertaken. There have been other recommendations for multi-disciplinary pain management referrals and functional abilities assessments in order to better objectify the Appellant's limitations without indication of completion.
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> [39] The Tribunal is cognizant of the psychological diagnoses made by Dr. Lowick subsequent to the expiration of the Appellant's MQP. To date, however, there has been minimal psychological counseling and that has been limited to a few treatment sessions. According to the Appellant those few counseling sessions were noted to have been beneficial. At the time of the MQP there had been no psychological intervention. The Appellant testified further that she was unsure as to whether or not she had trialed anti-depressant or anti-anxiety medication as of that time.
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> [40] The Appellant testified that she has been apprehensive about pursuing recommended treatment options given her prior negative response to certain medications. The Appellant has, however, conceded to trials of other medications such as Nucynta and Torodol subsequent to the multiple treatment recommendations previously noted. She was taking Eltroxin medication according to Dr. Barrettara's last report in 2016. Then there is the issue of the limited psychological intervention despite numerous recommendations that psychological support would be crucial in the Appellant's overall treatment. Given the oral the medical evidence presented, the Tribunal finds that as of the

[5] *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211; *Bulger v. Canada (Minister of Human Resources Development)* (May 18, 2000) CP 09164 (PAB).

> expiration of her MQP, the Appellant's treatment had not been exhaustive both in terms of her physical or psychological symptoms. Though apprehension was expressed because treatment efficacy could not be guaranteed, the same risk to benefit ratio holds true for the other medications the Appellant has taken since that time. Again, her psychological symptoms had yet to be explored as of the time of her MQP and to date they have received little treatment attention.

[17] I have seen nothing that suggests these findings departed in any significant way from the underlying evidentiary record. In the absence of an egregious factual error, the General Division was within its authority to conclude that the Applicant had unaccountably failed to follow through with treatment recommendations. During the hearing, the Applicant was offered an opportunity to justify her reluctance to take medications, and she testified that they either were ineffective or caused unwanted side effects. However, the General Division found this explanation wanting, particularly where Dr. Toma's February 2014 recommendations were concerned. The Applicant testified that she declined nerve block injections because there was no guarantee they would work and refused her chronic pain specialist's suggested medication trial because of negative experiences with her prior medications. In the General Division's view, this account could not be reconciled with her past willingness to investigate painkillers.

[18] It is important to recognize that it is not the Appeal Division's role to agree or disagree with the General Division's findings of fact, but rather to assess whether, if material, its findings are perverse, capricious or without regard for the record. In this case, where the General Division has offered intelligible and defensible reasons for discounting the Applicant's explanation for her conduct, I see no reason to interfere.

CONCLUSION

[19] 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