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

Citation: *B. Y. v. Minister of Employment and Social Development*, 2017 SSTADIS 473

Tribunal File Number: AD-16-1264

BETWEEN:

B. Y.

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 12, 2017

REASONS AND DECISION

INTRODUCTION

[1] On September 28, 2016, having found that the Applicant's disability was not severe, 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. The Applicant filed an application for leave to appeal with the Tribunal's Appeal Division on November 3, 2016.

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] Subsection 58(1) of the DESDA identifies the only grounds of appeal available to the Appeal Division, which 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 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;

rather, 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" (paragraph 12): *Osaj v. Canada (Attorney General)*, 2016 FC 115.

[7] 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

[8] The Applicant, arguing that she always did what her doctor recommended, submits that the General Division determined that she was not following her doctor's recommendations to increase the medication she was taking.

[9] The Applicant submits that she was not provided with documents that were referred to in respect of her failure to increase her medication, which would have been helpful in her recollection of what had actually transpired.

[10] The Applicant submits that she had not been provided with copies of the documents that the General Division and her representative referred to during the hearing, which would have helped her answer questions with certainty.

ANALYSIS

Error of Fact

[11] In respect of the Applicant's submission that she followed her doctor's recommendations despite the General Division statement that she did not, I find that the Applicant is essentially arguing that the General Division decision (Decision) was based on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it, which is a ground of appeal under paragraph 58(1)(*c*) of the DESDA.

[12] I find that this submission does not have a reasonable chance of success on appeal, as the General Division considered all the evidence, including the Applicant's oral testimony, in

making its decision, and the medical records indicate that the Applicant did not increase her medications as recommended.

[13] I note that, at paragraph 11 of the Decision, the General Division recognizes that the Applicant struggled to recollect different elements of her treatment and that she also struggled with recalling the time frames involved.

[14] The discovery of whether the treatment recommended by physicians has been followed is relevant to the determination of a disability under the CPP. In *Klabouch v. Canada (Social Development)*, 2008 FCA 33, at paragraph 16, the Federal Court stated that an applicant must adduce medical evidence in support of a claim, as well as evidence of efforts to obtain work and to manage his or her medical condition. Further, in *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211, at paragraph 19, the Federal Court stated that the refusal to undergo treatment recommended by a physician may, if that refusal is unreasonable, disentitle an applicant from receiving a disability benefit. See also: *Kambo v. Canada (Human Resources Development)*, 2005 FCA 353, at paragraph 3, where the appellant had consistently received medical advice to increase her physical exercise and activities but had unreasonably failed to do so; *Kaminski v. Canada (Social Development)*, 2008 FCA 225, at paragraph 14, where the applicant was resistant to treatment from his treating family physician and specialist; and *Warren v. Canada (Attorney General)*, 2008 FCA 377, at paragraph 6, where there was evidence that the applicant, without giving any explanation, had failed, to abide by and submit to treatment recommendations.

[15] In paragraph 12 of the Decision, the Applicant, when asked why she did not increase her medication, advises that she did make changes on a variety of occasions. She was then asked why she had not increased her dosage as recommended in January 2014 and November 2014. She failed to answer why her prescribed venlafaxine had not been increased from 112.5 milligrams, despite the recommendation of two psychiatrists that she increase it to 150 milligrams and higher until the desired results were obtained.

[16] Further, in paragraph 13 of the Decision, the Applicant, when asked why her family doctor indicated in medical notes that she was reluctant to increase the dosage of her medication, cannot explain and states that she followed her doctor's recommendation. The

Applicant was then directed to the March 23, 2015, letter she had written. In response, she stated that she did not want to risk the side effects from an increase in dosage while her father was sick and dying, and while she needed to spend time with him. She was afraid that her fatigue was related to her medication. I note that this handwritten letter was directed to the Tribunal and that it reads as follows:

> In November, 2014 it was recommended again for another increase. At this time I didn't due to the fact that I have been extremely tired. I wasn't sure if it was because I was dealing with additional stress with a sick father or not. I was going to look at options around that time but because of my dad's ongoing issues I didn't think it was the right time."

The General Division also refers to this letter at paragraph 29 of the Decision, in its analysis.

[17] The General Division referred to the medical evidence that recommended that the Applicant increase her medication, specifically venlafaxine. Specifically, at paragraph 20 of the Decision, the General Division mentions the January 21, 2014, medical report by Dr. Chernick, psychiatrist, who noted that the Applicant may have been reluctant to take psychotropic medications because of the stigma attached to psychiatric illness. Dr. Chernick also noted that the Applicant had wondered whether the venlafaxine was the reason she was fatigued, even though the fatigue had preceded the medication. Dr. Chernick recommended an increase from 75 to 150 milligrams of venlafaxine daily, and then to 225 milligrams if remission was not obtained after three to four weeks. The document that the General Division referred to is found at GD2-56.

[18] In several paragraphs of the Decision, the General Division references different medical reports that indicate that the Applicant should increase her dosage of venlafaxine, namely:

- in paragraph 22, Dr. Fawell's, February 12, 2014, medical report, which indicated that a psychiatrist had recommended an increase in venlafaxine from 75 to 150 milligrams (page GD2-78);

- Dr. Fawell's June 16, 2014, medical report to the Applicant's insurer, where it indicated that she was on 112.5 milligrams of venlafaxine and, that the plan was to increase this to 150 milligrams (paragraph 24);

- the August 26, 2014, medical report supporting the Applicant's claim for disability benefits, where Dr. Fawell indicated she was on 112.5 milligrams of venlafaxine, eight months after Dr. Chernick's recommended increase to 150 milligrams and then to 200 milligrams if there was no improvement (paragraph 26);

- the November 25, 2014, medical report by Dr. Pachal, psychiatrist, who indicated that the Applicant was on 112.5 milligrams of venlafaxine with no side effects and who recommended that she increase to 150 milligrams and continue to increase, noting that some people require 300 milligrams daily (paragraph 27); and

- the January 26, 2015, medical report by Dr. Fawell, who indicated that the Applicant was still on 112.5 milligrams of venlafaxine and who was hesitant to increase until she consulted Dr. O'Kane (paragraph 28).

[19] The General Division notes, in several paragraphs of its Decision, that the medical reports repeatedly recommended that the Applicant increase her dosage of venlafaxine to 150 milligrams and higher, and it discusses this aspect in respect of her claim for disability benefits.

[20] For these reasons, I find that the Applicant's submission that the General Division found that she had failed to follow her doctor's recommendations—when she stated that she had—does not have a reasonable chance of success. There are several records that indicate she required an increase in venlafaxine.

Natural Justice

[21] In respect of the Applicant's two submissions that she had not been provided with documents that were referred to in respect of her failure to increase her medication, which would have been helpful in her remembering what had actually transpired, as well as the documents that the General Division and her representative referred to during the hearing that would have helped her answer questions with certainty, I find that the Applicant is arguing that the General Division failed to observe a principle of natural justice, which is a ground of appeal under paragraph 58(1)(*a*) of the DESDA.

[22] Natural justice requires an appellant to have a fair and reasonable opportunity to present his or her case. In the case of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC), at paragraph 30, the Supreme Court of Canada stated: "At the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly."

[23] The Applicant was represented throughout her appeal to the General Division by the Disability Claims Advocate Clinic. On June 1, 2015, she completed a Consent to Communicate Information to an Authorized Person form and submitted it to the Tribunal, authorizing the representative to act on her behalf. It authorized the representative to disclose to the Tribunal any and all information, orally or in writing.

[24] The representative acted on the Applicant's behalf throughout the process, including submissions to the Tribunal (GD4). At the hearing, however, a different representative attended. This person was an employee of the previous representative. At 02:11 of the audio recording of the hearing, the General Division raised the issue that the new representative was not documented as a representative. The Applicant gave her verbal consent for the new representative to represent her, and she agreed to complete another consent authorization and send it to the Tribunal later in the day (05:25 of the hearing). This was done accordingly. This is also covered in paragraph 1 of the Decision.

[25] The Applicant advised the General Division that she normally communicated with the representative over the telephone.

[26] At 11:50 of the hearing, the General Division asked the Applicant whether she had the file documentation. The Applicant advised that she did not have it. She advised it was scattered about and that she was not very organized at that moment. The Applicant was asked whether she could access the "main part of the file," specifically a 162-page document. The Applicant advised that she did not think she had received it. However, the representative indicated that she had a copy. After a short review, the General Division observed that it had been sent to the representative. This was permissible, given the consent to communicate that the Applicant had duly completed and had agreed to. The General Division then stated that there would be a couple of questions that it would deal with as the hearing progressed, and that the Applicant

was invited to provide input. The Applicant agreed. The representative did not voice any concerns about the process.

[27] The hearing continued with a significant amount of time dedicated to the medications that the Applicant was on and why she was reluctant to increase her venlafaxine. The Applicant stated that she always followed her doctor's directions. The representative also spoke to the issue of the medications at 35:08 of the audio recording, when she referred to page GD7-26, where Dr. O'Kane, on December 18, 2015, indicated that the Applicant had tried Wellbutrin and venlafaxine, and that she was currently on Prestique, arguing that the Applicant followed her doctor's directions in respect of medications.

[28] At 1:00:54 of the audio recording, the General Division referred to the March 23, 2015, letter that the Applicant had submitted (paragraph 16 above), indicating that, due to her reluctance, she had not increased her medication dosage. The Applicant stated that she is always reluctant with medication but that she always did what her doctor suggested.

[29] When asked whether there were any further questions or concerns prior to ending the hearing, neither the Applicant nor the representative indicated any concerns with the hearing or the documentation.

[30] In respect of her testimony, this is accurately reflected in the Decision in paragraphs 11 through 19.

[31] In this particular case, the Applicant was given a reasonable opportunity to present her case as required by *Baker*. She was represented by a firm whom the Applicant dealt with throughout the process. During the hearing, there was ample opportunity provided to the Applicant to answer the questions, and the representative was also given ample opportunity to make submissions. There were times during the audio recording when the Applicant challenged the medical records that indicated that her venlafaxine should be increased, consistent with the Decision. She stated that she always did what her doctor recommended. Further, there was sufficient and clear information offered to the Applicant throughout the process in respect of the process and procedure, which were followed.

[32] The Applicant had the full opportunity to refer to documents and to speak with her representative and, as such, I do not find that this ground has a reasonable chance of success on appeal.

[33] I reviewed the underlying record in accordance with *Griffin v. Canada (Attorney General)*, 2016 FC 874, at paragraph 20, and I found no instance where the General Division failed to properly account for any of the evidence.

CONCLUSION

[34] The Application is refused.

Peter Hourihan
Member, Appeal Division