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

Citation: *I. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 467

Tribunal File Number: AD-17-194

BETWEEN:

I. B.

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 21, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada dated November 30, 2016. The General Division had earlier conducted an in-person hearing 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 the minimum qualifying period (MQP), which it determined had ended on December 31, 2016.

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

THE LAW

Canada Pension Plan

[3] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) be under 65 years of age;

(b) not be in receipt of the CPP retirement pension;

(c) be disabled; and

(d) have made valid contributions to the CPP for not less than the MQP.

[4] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[5] Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

Department of Employment and Social Development Act

[6] 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.

[7] 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.

[8] 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.

[9] Some arguable ground upon which the proposed appeal might succeed is needed for leave 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]

[10] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first 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 stage, the Applicant does not have to prove the case.

---

[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

ISSUE

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

SUBMISSIONS

[12] The Applicant's representative submitted a 27-page brief with the application for leave that contained detailed commentary on the General Division's decision. She cited many instances in which she claimed the General Division failed to observe principles of natural justice, erred in law or based its decision on erroneous findings of fact.

[13] The submission also included an affidavit sworn by the Applicant on February 28, 2017, that made specific allegations about the presiding General Division member's conduct during the hearing, as well as 123 pages of assorted documents, including legal precedents, information brochures about various medications and diseases and medical reports, none of which, it appears, had been previously submitted to the Tribunal.

ANALYSIS

[14] At this juncture, I do not find it necessary to address each and every point that the Applicant has raised; however, I will make preliminary comments on four issues prior to a full hearing on the merits of this appeal.

Conduct of General Division Member

[15] The Applicant alleges that the presiding General Division member was biased and engaged in behaviour that ignored her psychiatric condition. She claims that the General Division member badgered and aggressively cross-examined her during the in-person hearing of November 24, 2016. As a result, she became anxious and flustered and was unable to present her evidence effectively.

[16] At this point, I see a reasonable chance of success on this ground. I have not yet listened to the audio recording of the hearing before the General Division but, if the Applicant's allegations are true, they may amount to a violation of a principle of natural justice—specifically, the right of a litigant to be heard.

[17] Prior to considering this ground on its merits, I will be reviewing the audio record to confirm that the Applicant's allegations and supporting affidavit evidence correspond to what was actually said during the hearing. While doing so, I will bear in mind the doctrine of waiver,[3] which requires a claimant to raise an apprehended violation of natural justice at the earliest practicable opportunity; if no objection is made at the hearing, for instance, the party alleging the breach may be taken to have provided an implied waiver of any perceived breach of unfairness.

Alleged Denial of Hearing Rights

[18] The Applicant's representative suggests that the General Division's decision was "unsolicited and premature" because it came prior to the Applicant's MQP, which ended on December 31, 2016. In her words,

> claimant was only seeking to address and review prior decisions rendered by CPP Department pertaining to MQP in April 2014 (as per date of Medical Certificate of April 4, 2014 or, what was expressed during the hearing at most on the day when Psychiatric Certificate was issued May 2015…

[19] I am willing to hear further argument on this question, but on first glance it appears that the Applicant's representative is confused about the nature and purpose of the MQP. The CPP is explicit in requiring claimants to show that they became disabled on or before the end of the MQP; one cannot pick and choose the date to be assessed for disability—even if the MQP is current. The MQP is based on a formula tied to the claimant's earnings and contribution history, and whether his or her disability is "severe and prolonged" is ordinarily assessed as of the final day of that period. If, as was the case in the Applicant's appeal, the end of the MQP lies in the future, then "severe and prolonged" is assessed as of the day of the medical adjudication or Tribunal hearing, as the case may be.

[20] To date, this is what appears to have been done at every step of the Applicant's appeal process. The Applicant's representative suggests there was an "apparent error and discrepancy" in either the Respondent's or the General Division's respective determinations of the MQP, because its end date changed over time, going from December 31, 2015, in the Respondent's

[3] *Benitez et al* v. *Minister of Citizenship and Immigration*, 2006 FC 461 (CanLII).

initial and reconsideration decision letters,[4] to December 31, 2016, in the Respondent's submissions to the Tribunal[5] and the General Division's decision. However, this revision appears to have been not a product of incompetence, as the Applicant implies, but merely a reflection of an update to her record of earnings sometime in early 2015,[6] which registered valid earnings and contributions in 2014, thereby extending her MQP by another year.

[21] The rules governing the CPP disability regime are often far from obvious, but it is nevertheless incumbent on claimants—particularly those with legal representation—to familiarize themselves with rules such as those surrounding the calculation of their MQP.

Characterization of Problem with First Interpreter

[22] The Applicant's representative takes issue with paragraph 4 of the decision, alleging that the General Division committed a factual error by mischaracterizing a problem with the Polish interpreter who was on hand for an abortive hearing on October 27, 2016. The Applicant's representative maintained that she objected to the interpreter, not because he spoke the wrong dialect of Polish, but because he could not, or would not, accurately translate a commonplace term.

[23] For now, I see little merit in this argument, which does not appear to raise a material issue. Whatever the perceived deficiency in the first interpreter, the record indicates that the General Division adjourned the hearing so that a second interpreter, one more acceptable to the Applicant, could be made available. The General Division's error, if it was that, in documenting this episode was at most minor, and I cannot see how it prejudiced the Applicant's interests or affected the outcome of her appeal.

Submission of New Documents

[24] Accompanying the Applicant's notice requesting leave were a number of documents, none of which appear to have been presented to the General Division. An appeal to the Appeal Division is not ordinarily an occasion on which new evidence can be considered, given the

[4] Initial decision dated August 11, 2014, and reconsideration decision dated March 18, 2015.
[5] Submissions of the Minister dated November 20, 2015.
[6] Compare records of earnings generated on October 27, 2014 (GD2-60) versus June 16, 2015 (GD2-5).

constraints of subsection 58(1) of the DESDA. Once a hearing is concluded, there is a very limited basis upon which any new or additional information can be raised. An applicant could consider making an application to the General Division to rescind or amend its decision. However, an applicant would need to comply with the requirements set out in section 66 of the DESDA, as well as sections 45 and 46 of the *Social Security Tribunal Regulations*. Not only are there strict deadlines and requirements that must be met to succeed in an application to rescind or amend, but an applicant would also need to demonstrate that any new facts are material and that they could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

CONCLUSION

[25] Subject to the above provisos, I am granting the Applicant leave to appeal. Should the parties choose to make further submissions, they are free to offer their views on whether a further hearing is required and, if so, what format is appropriate.

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

Member, Appeal Division