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

Citation: *Minister of Employment and Social Development v. A. O.,* 2017 SSTADIS 492

Tribunal File Number: AD-17-57

BETWEEN:

**Minister of Employment and Social Development**

Applicant

and

**A. O.**

Respondent

# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: September 27, 2017

## REASONS AND DECISION

## INTRODUCTION

[1] On October 24, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was payable to the Respondent.

[2] The General Division held an in-person hearing, and it determined that:

a) the Respondent's minimum qualifying period (MQP) would end on December 31, 2021;

b) she had attempted to re-enter the workforce many times, and each time she was unable to meet her work demands due to her medical condition;

c) the reports of Dr. T. Bowering and Dr. Budzianoska-Kwiatkowski indicated that the Respondent's health situation was serious and requires ongoing treatment;

d) the Respondent had experienced anxiety issues for a lengthy period of time and had been undergoing treatments, which, while helpful, had not alleviated the Appellant's symptoms enough to allow her to maintain her employment;

e) in August 2010, the Respondent met the criteria required to establish that her condition was severe and prolonged; and

f) the Applicant had received the Respondent's application for CPP disability benefits in March 2014; therefore, she is deemed disabled in December 2012, and payments will start as of April 2013.

[3] Based on these conclusions, the General Division allowed the appeal.

[4] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on January 23, 2017, within the 90-day time limit.

## ISSUE

[5] Does the appeal have a reasonable chance of success?

## THE LAW

[6] Pursuant to paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESD Act), an application must be made to the Appeal Division within 90 days after the day on which the decision appealed was communicated to the appellant.

[7] According to subsections 56(1) and 58(3) of the DESD Act, 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.

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

[9] Subsection 58(1) of the DESD Act states that 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 that it made in a perverse or capricious manner or without regard for the material before it.

## SUBMISSIONS

[10] The Applicant's grounds of appeal are that the General Division erred in law and that it made erroneous findings of fact in arriving at its decision. The Applicant's arguments can be summarized as follows:

a) The General Division erred in law when, contrary to *Klabouch v. Canada (Social Development)*, 2008 FCA 33, it focused on the severity of the Respondent's medical condition and not on whether the condition prevented her from being substantially gainfully employed.

b) The General Division erred in law in its application of the principles set out by the Federal Court of Appeal in *Inclima v. Canada (Attorney General)*, 2003 FCA 117, by failing to assess whether the Respondent had been unsuccessful at obtaining and maintaining employment due to her health condition.

c) The General Division made findings of fact without regard to the material before it, specifically pertaining to:

    i. Its focus on two medical reports and not on the most recent report, which suggested an improvement in the Respondent's condition.

    ii. Its failure to consider that the Respondent stopped working in 2010, in part, because she was about to have her first child.

**ANALYSIS**

**Error of law**

[11] The General Division's decision refers to three Federal Court of Appeal decisions at paragraphs 21 to 23. They include *Klabouch* and *Inclima*.

[12] The Applicant submits that the General Division erred in law by failing to properly apply *Klabouch* and *Inclima*.

[13] In the General Division's analysis, it noted that:

> [28] The Tribunal also notes that the Appellant has attempted many times to re-enter the workforce and each time she is unable to meet her work demands due to her anxiety issues. The evidence also shows that the Appellant was working at an entry level where the expectation level and stress level were not significant and yet she still was unable to maintain her employment.

[14] The Applicant points to the Respondent's steadily gainful employment for 18 years, from 1993 until 2010, and to her consistently growing income in the last five years of her employment up until she left her job in August 2010. It submits that the analysis of the years since August 2010 is necessary as her MQP date is in the future. Therefore, the General Division erred in law when it did not analyze why the Respondent did not attempt to find employment after 2010.

[15] In addition, the Applicant relies on *Inclima* for the principle that where there is evidence of work capacity, a claimant must show that efforts to obtain and maintain employment have been unsuccessful by reason of a health condition. It submits that Respondent clearly had work capacity, as there was evidence of work activity. Yet, the General Division did not assess whether her efforts to obtain and maintain employment were unsuccessful by reason of her medical condition. It also did not consider that the Respondent did not attempt to find any employment after August 2010.

[16] The record appears to indicate that the Respondent had increased anxiety during her first pregnancy in 2010. Her MQP is in the future (in 2021). The General Division does not appear to have assessed the Respondent's workforce attachment or her reasons for not attempting to find employment after August 2010.

[17] Based on this issue, the Applicant's submissions and the face of the record, I am satisfied that the appeal has a reasonable chance of success at the leave to appeal stage.

**Alleged erroneous findings of fact**

[18] The Applicant argues that the General Division made an erroneous finding of fact when it found that the Respondent suffered from a severe and prolonged disability, because "the conclusion […] is contradictory to the medical evidence before it."

[19] The Federal Court of Appeal in *Mette v. Canada (Attorney General)*, 2016 FCA 276, indicated that it is unnecessary for the Appeal Division to address all the grounds of appeal that an applicant has raised. In response to the Respondent's arguments that the Appeal Division was required to refuse leave to appeal on any ground it found to be without merit, Dawson J.A. stated that subsection 58(2) of the DESD Act "does not require that individual

grounds of appeal be dismissed […] individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave." This application is one of the situations described in *Mette*.

[20] Because the alleged errors of law may be interrelated to the analysis of whether the Respondent's medical condition was severe and prolonged, I will not parse the grounds of appeal any further at this stage of the proceedings.

**CONCLUSION**

[21] The Application is granted.

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

Shu-Tai Cheng
Member, Appeal Division