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

Citation: *T. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 461

Tribunal File Number: AD-17-360

BETWEEN:

T. B.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Kate Sellar

Date of Decision: September 20, 2017

REASONS AND DECISION

INTRODUCTION

[1] On February 6, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* was not payable to the Applicant.

[2] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on May 1, 2017.

ISSUE

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

THE LAW

Leave to Appeal

[4] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Appeal Division of the Tribunal may be brought only if leave to appeal is granted. The Appeal Division must either grant or refuse leave to appeal.

[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.

Grounds of Appeal

[6] According to subsection 58(1) of the DESDA, the only grounds of appeal are:

> (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.

BACKGROUND

[7] The General Division determined that the Applicant had not proven, on a balance of probabilities, that she had had a severe disability on or before her minimum qualifying period (MQP) of December 31, 2016.

[8] The General Division took the required "real world" approach to assessing the severity of the Applicant's disability and found that the Applicant does experience some functional and psychological barriers. The General Division found that, given her experience and young age, the Applicant would be a candidate for suitable retraining for work within her limitations. At the time of the Applicant's MQP, several treatments and referral options remained outstanding, and treatment had yet to be exhaustive. The General Division was not satisfied that the Applicant had a severe disability, as would be required to qualify for the disability pension. The General Division decision expressly stated that the Member had reviewed all the medical evidence in the hearing file and that it had weighed the Applicant's oral testimony and the medical reports, including from her family physician, Dr. McLean.

SUBMISSIONS

[9] The Applicant submits that the General Division erred in fact and in law.

[10] The Applicant argues that:

a) The Tribunal did not take into account the opinion of Dr. McLean, who stated that the cumulative impact of the Applicant's conditions prevented her from performing any work; and

b) The Applicant takes pain medication and antidepressants to control her conditions. The side effects of these medications include fatigue and dizziness, and the side effects were evident prior to her MQP; and

c) There was not suitable employment, given the Applicant's cumulative conditions at the time of her MQP.

ANALYSIS

Dr. McLean's Opinion

[11] The Applicant argues that the General Division erred by failing to take into account relevant evidence from Dr. McLean. If such an error occurred, it would arguably be an error of law pursuant to paragraph 58(1)(*b*) of the DESDA.

[12] However, the General Division's decision indicates that the Tribunal reviewed all the medical reports in the hearing file. Dr. McLean's opinion was before the Tribunal and was dated November 17, 2015. The report did state that the Applicant was unable to work. The General Division reviews Dr. McLean's evidence in some detail at paragraph 22 of the decision, and it references his conclusion that, "[t]he Appellant [now Applicant] was unable to work on a full-time basis and was unable to perform any repetitive tasks with her right arm or sit for any prolonged period." In paragraph 24, the General Division also refers to Dr. McLean's January 9, 2017, follow-up report. In its analysis of the medical evidence at paragraph 30 of the decision, the General Division expressly considers Dr. McLean's opinion, weighing it along with the Applicant's evidence and the available psychiatric evidence.

[13] On an application for leave to appeal, the Appeal Division determines only whether the Applicant has a reasonable chance of success on any of the grounds of appeal. The Appeal Division's role is not to reweigh evidence [see *Bellefeuille v. Canada (Attorney General)* 2014 FC 963], as weighing and assessing evidences lies at the heart of the General Division's mandate [see *Hussein v. Canada (Attorney General)*, 2016 FC 1417].

[14] Given that the medical report was considered and weighed, the Applicant's argument about Dr. McLean's report amounts to a request to weigh that evidence differently and then come to a different conclusion about whether the Applicant's disability is severe, i.e. whether she is incapable regularly of pursuing any substantially gainful employment.

[15] The General Division held a hearing, reviewed the evidence, weighed that evidence and provided a logical basis for the conclusion that the Applicant did not have a disability that is severe within the meaning of the law, as is required in order to receive a disability pension. These are all proper and recognized General Division functions. The Appeal Division finds that this ground has no reasonable chance of success on appeal.

Impact of Medication

[16] The Applicant argues she experienced side effects from the use of her medication prior to her MQP. This submission does not raise a ground of appeal pursuant to subsection 58(1) of the DESDA. The decision by the General Division expressly acknowledges the role that side effects played in the Applicant's experience in the description of the Applicant's submissions at paragraph 25 and again in the General Division's analysis of that evidence at paragraph 34.

[17] The Appeal Division is satisfied that the General Division heard this evidence, weighed it and took it into account in its decision. The Appeal Division cannot reweigh evidence. The Appeal Division finds that this submission does not raise a ground of appeal that has a reasonable chance of success on appeal.

No Suitable Employment

[18] The Applicant argues that there was no suitable employment for her at the time of the MQP, given her cumulative conditions. This submission does not raise a ground of appeal pursuant to subsection 58(1) of the DESDA. The General Division considers the cumulative effect of the Applicant's medical conditions at paragraphs 35 and 36. At paragraph 35, the General Division finds that the Applicant's conditions precluded her from resuming the "demanding 50-60 hour workweek primarily using a computer" that the Applicant had not "looked for any modified work or re-training" and that "[s]he has only sought confirmation from her previous employer in 2016 that they could not offer her any modified role to return to."

[19] At paragraph 36, the General Division determines that, even when assessed cumulatively, the global conditions were not of such severity as to preclude regular

participation in any substantially gainful employment, be that full-time, part-time or seasonal work.

[20] Where the General Division finds that the Applicant has a residual capacity to work (as it did in this case), the case law requires the General Division to determine whether the Applicant made efforts to obtain and maintain employment, as well as whether those efforts were unsuccessful because of her health condition [see *Inclima* v. *Canada (Attorney General)*, 2003 FCA 117]. Whether real jobs are available in the labour market is irrelevant [see *Canada (Human Resources Development) v. Rice* 2002 FCA 47].

[21] The Appeal Division is satisfied that the General Division reviewed and weighed the evidence in relation to the Applicant's cumulative conditions, that it reached a conclusion about employment efforts, and that it provided reasons for reaching that conclusion. The Applicant appears merely to be re-stating the conclusion that she wanted the General Division to reach, but she raises no ground of appeal pursuant to the DESDA in this argument. The Appeal Division finds that this submission does not raise a ground of appeal that has a reasonable chance of success on appeal.

No Other Errors

[22] The Appeal Division examined the record and is satisfied that the General Division did not overlook or misconstrue any of the evidence [see *Karadeolian v. Canada (Attorney General)*, 2016 FC 615].

CONCLUSION

[23] The Application for leave to appeal is refused.

Kate Sellar
Member, Appeal Division