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

Citation: *C. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 486

Tribunal File Number: AD-17-34

BETWEEN:

C. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: September 25, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated October 27, 2016, which determined that the Applicant was not eligible for a Canada Pension Plan disability pension, as it found that she did not have a severe disability as defined by the *Canada Pension Plan* by the end of her minimum qualifying period on December 31, 2016. The Applicant submits that 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.

ISSUE

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

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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.

[4] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

[5] The Applicant claims that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it, in determining that she does not have Lyme disease. She argues that the General Division should not have accepted the results of tests conducted in 2013 to 2014 or the medical opinion of Dr. Salit, who is not treating her. The Applicant essentially argues that Dr. Salit's opinion is unreliable; after all, he had purportedly dismissed IGeneX testing, saying that they all return positive results, although she now has evidence of at least one negative test. The Applicant maintains that the General Division should have accepted two tests that were positive for Lyme disease, notwithstanding the fact that Dr. Salit had dismissed these results.

[6] In *Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92, the Federal Court of Appeal held that a careful analysis of conflicting evidence is required. Similarly, in *Canada (Attorney General) v. Fink*, 2006 FC 354, the Federal Court of Appeal required the Pension Appeals Board to analyze, accept, reject or otherwise explain why it preferred any of the medical or expert opinion evidence over others, otherwise this would amount to a reviewable error.

[7] Hence, in the face of conflicting medical opinions or testing, the General Division was entitled to assign more weight or to prefer the medical opinions of one or a set of practitioners over others, provided that it explained its decision in this regard.

[8] The General Division gave detailed reasons why it preferred the medical opinion of Dr. Salit over those of family physicians and a naturopathic doctor, noting, amongst other things, that Dr. Salit is recognized as a specialist in infectious diseases and a professor of medicine. The General Division also found that Dr. Salit's opinion was supported by the Applicant's medical history, the lab tests and the findings of other specialists, unlike the opinions of the two family physicians and naturopathic doctor. The General Division conducted a careful analysis of the conflicting evidence. In light of this analysis, I do not see that it committed a reviewable error.

[9] The Applicant now intends to rely on the results of her friend's negative Lyme disease test, along with updated medical records. These were not available or before the General Division. It has now become well-established law that new evidence generally is not permitted

on an appeal under section 5 of the DESDA. In *Canada (Attorney General) v. O'Keefe*, 2016 FC 503, at para. 28, Manson J. determined that:

> Under sections 55 to 58 of the DESDA, the test for obtaining leave to appeal and the nature of the appeal has changed. Unlike an appeal before the former [Pension Appeals Board], which was *de novo*, an appeal to the [Social Security Tribunal – Appeal Division] does not allow for new evidence and is limited to the three grounds of appeal listed in section 58.

[10] In *Cvetkovski v. Canada (Attorney General)*, 2017 FC 193, at para. 31, Russell J. determined that "new evidence is not admissible except in limited situations […]." More recently, in *Glover v. Canada (Attorney General)*, 2017 FC 363, the Federal Court adopted and endorsed the reasons in *O'Keefe*, concluding that the Appeal Division had not erred in refusing to consider new evidence in that case, in the context of the application for leave to appeal. The Court also noted that the DESDA makes provisions under section 66 for the General Division to rescind or amend a decision where new evidence is presented by way of application.

[11] Based on the facts before me, I am unconvinced that there are any compelling reasons why I should admit the updated medical records as there is no indication that they fall into any of the exceptions. As the Federal Court has determined, generally, an appeal to the Appeal Division does not allow for new evidence.

[12] Essentially, the Applicant is requesting that I reassess the medical evidence in her favour. However, subsection 58(1) of the DESDA provides for only limited grounds of appeal. It does not allow for a reassessment or rehearing of the evidence: *Tracey*, *supra*.

[13] While I understand that the Applicant disagrees with the General Division's findings, she has not identified any reviewable errors or grounds of appeal that fall under subsection 58(1) of the DESDA. Accordingly, I am not satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[14] The application for leave to appeal is refused.

Janet Lew
Member, Appeal Division