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

Citation: *S. G. v. Minister of Employment and Social Development*, 2017 SSTADIS 511

Tribunal File Number: AD-16-1290

BETWEEN:

S. G.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Meredith Porter

Date of Decision: October 3, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant is seeking leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated October 19, 2016, which determined that she was not entitled to disability pension benefits pursuant to the Canada Pension Plan (CPP). The General Division found that the Applicant had failed to establish that she had suffered a "severe" disability on or before her minimum qualifying period (MQP) date, which was December 31, 1999.

[2] Pursuant to section 55 of the Department of Employment and Social Development Act (DESD Act), "Any decision of the General Division may be appealed to the Appeal Division." The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on November 15, 2016.

ISSUE

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

THE LAW

[4] According to subsections 56(1) and 58(3) of the DESD Act, "An appeal to the Appeal Division may only be brought if leave to appeal is granted" and "The Appeal Division must either grant or refuse leave to appeal." Determining leave to appeal is a preliminary step to a decision on the merits and is an initial hurdle for an applicant to meet. However, the hurdle is lower than the one that must be met when the appeal is decided on the merits.

[5] Subsection 58(2) of the DESD Act provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." In order for leave to appeal to be granted, the Applicant must establish that there is some arguable ground upon which the proposed appeal might succeed (*Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630). An arguable case at law is akin to determining whether, legally, an appeal 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).

[6] According to subsection 58(1) of the DESD Act, 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

[7] The Applicant has submitted that the General Division based its decision on an erroneous finding of fact, pursuant to paragraph 58(1)(*c*) of the DESD Act, in failing to find that the Applicant had "clearly" demonstrated symptoms of epilepsy prior to her MQP date despite her actual diagnoses with epilepsy occurring in 2003.

[8] The Applicant further submits that the General Division's decision is based on an erroneous finding of fact with respect to the Applicant's capacity to work. The Applicant argues that, although the General Division determined that the Applicant was capable regularly of gainful employment, it overlooked the fact that the Applicant was capable of completing work-related tasks only with the assistance of her children. The Applicant asserts that working for her husband was an employment position that was "sympathetic" to her health condition, as no other employer would allow for outside help from her children.

ANALYSIS

Did the General Division err in failing to consider evidence of the Applicant's epilepsy, which pre-dated her MQP?

[9] The Applicant has argued that the General Division erred in finding that the Applicant had failed to prove, on a balance of probabilities, that she suffered from problematic symptoms attributed to epilepsy until after her MQP date of December 31, 1999. In fact, the Applicant argues, the General Division clearly acknowledges that the Applicant had been suffering problematic symptoms prior to her MQP date, as the General Division cites evidence in the medical records that reflects that the Applicant had attended several medical appointments as a result of the symptoms she had been experiencing prior to her MQP, including anxiousness, warm sensations, loss of speech and a brief loss of consciousness. It is the Applicant's position that the medical evidence clearly reflects that she had been suffering from epilepsy prior to her actual diagnoses of that health condition in 2003.

[10] It may be the case that the Applicant was suffering from problematic symptoms prior to her MQP date. However, I have reviewed the record in its entirety and have listened to the recording of the General Division hearing. The evidence in the record, and the Applicant's oral evidence at the hearing, is that the Applicant worked from 1994 until 2006 doing accounting and bookkeeping for her husband's business. She worked at least 30 hours per week for her husband, and her oral evidence was that, in some weeks, she "must have worked more" than 30 hours.

[11] Determining disability under the CPP is not based on the diagnosed health condition, but is determined based on the individual's capacity to work (*Klabouch v. Canada (Minister of Social Development)*, 2008 FCA 33). Nothing turns on whether the Applicant's formal diagnoses with epilepsy occurred prior to or following her MQP date in this case. The fact remains that she was capable of working at least 30 hours per week for her husband until well after her MQP date in December 1999. In fact, her testimony was that she was solely responsible for the bookkeeping work that she did over the period of time that she was working for her husband, up until 2006. Although she had begun to experience some difficulties with her

cognitive functioning, it was her evidence that the difficulties began only "towards the end" of the period of employment with her husband's business.

[12] Although the Applicant has asserted that she left her employment with her husband's business as a result of her health condition, the evidence regarding this particular issue is somewhat unclear. In her testimony, she discussed that she may have left as a result of the decrease in business that her husband's company had experienced with the downturn in the tobacco industry overall. She also spoke about her competing responsibilities she had at home caring for her children. There was also some discussion that she may have left as a result of the mistakes that she had begun to make with the bookkeeping she had been doing, which are, according to her, attributable to her decreased cognitive functioning resulting from her health condition.

[13] Whether she left her employment in 2006 as a result of her health condition is not helpful to her claim. The fact remains that she left her employment with her husband nearly six years after her MQP date, and that she had continued to work at least 30 hours per week until she did leave her employment, which does not support her claim that she had been incapable regularly of gainful employment on or before her MQP date.

[14] I do not find that the General Division erred in finding that the Applicant failed to demonstrate that she had suffered a "severe" health condition prior to her MQP date with respect to her diagnosed epilepsy. Leave to appeal cannot be granted on this ground.

Did the General Division err in failing to consider evidence that demonstrated that the Applicant lacked a capacity to work?

[15] The Applicant has submitted that the General Division ought to have considered that:

> "[the Applicant] attempted employment at her husband's company from 1994 to 2006 with the assistance of her children helping her. This employment position was sympathetic to her medical conditions and allowed for outside help anytime it was required. An outside family employer would not have accommodated the Appellants special needs."

[16] The Applicant also argues that her claim that she lacks a capacity to work is further supported by her attempt to work in 2008:

> "This was confirmed in 2008 when the Appellant secured a bookkeeping position but was terminated after a short period of time because of errors being made."

[17] Applicants seeking a disability pension must demonstrate that they have attempted to pursue employment opportunities suitable to their medical condition, and they must also diligently pursue treatment options prescribed in relation to their medical problems as well. There is no evidence in the record that the Applicant failed to pursue recommended treatment options. However, there is also no evidence in the record to support the claim that the Applicant required the assistance of her children in completing the tasks required when working for her husband's business from 1994 until 2006.

[18] The Applicant's representative suggested, during the hearing before the General Division (at 1:12:52 of the General Division hearing recording), that she had read somewhere in the record that the Applicant required her son's assistance to complete work-related tasks towards the end of her employment with her husband's business. The Applicant, however, had indicated during her hearing that she carried the sole responsibility for completing her work, despite her health condition, while employed by her husband's business. She did, however, confirm (at 1:13:48 of the hearing recording) that her son had assisted with administrative work near the end of her employment with her husband's business but this does not necessarily mean that he assisted her in completing the work that she did. He may have been working independently from the Applicant in completing unrelated tasks. The evidence does not support the claim that the Applicant could complete work-related tasks only with the assistance of her children as her representative has asserted. Regardless, the Applicant's oral evidence was that she completed her work without errors until near the end of her employment with her husband's business, which is well after her MQP date.

[19] Following her employment with her husband's business, Power Pressure Systems employed her for a three-month period in 2008. Her oral evidence was that that employer had fired her as a result of her inability to complete tasks without mistakes. However, her employment with Power Pressure Systems was well beyond her MQP date and her argument that her employment there demonstrates her continued incapacity to work, which she argues had commenced prior to her MQP date, does not hold much weight. There is no evidence that she

lacked a capacity to work on or before her MQP date, or even within a few years following her MQP.

[20] The Applicant may disagree with the General Division's findings, but the Applicant's disagreement with the General Division's findings is not a ground for appeal enumerated in subsection 58(1) of the DESD Act. The Appeal Division does not have broad discretion in deciding leave to appeal pursuant to the DESD Act, and it is not acceptable for the Appeal Division to explore the merits of the General Division decision in deciding whether to grant leave to appeal (*Misek v. Canada (Attorney General)*, 2012 FC 890). It would be an improper exercise of the delegated authority granted to the Appeal Division to grant leave to appeal on grounds not included in subsection 58(1) of the DESD Act (*Canada (Attorney General) v. O'keefe*, 2016 FC 503).

[21] I do not find that the General Division erroneously determined that the Applicant had retained a capacity to work, and I do not find that the General Division overlooked or misconstrued evidence in the record that demonstrated the Applicant's capacity for employment up until her MQP date and well afterwards. Leave to appeal is not granted on this ground.

CONCLUSION

[22] The Application is refused.

Meredith Porter
Member, Appeal Division