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

Citation: *R. O. v. Minister of Employment and Social Development*, 2017 SSTADIS 530

Tribunal File Number: AD-17-170

BETWEEN:

R. O.

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: October 12, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated November 15, 2016, which determined that the Applicant was ineligible 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 September 30, 2014, the month before she began receiving a retirement pension. The Applicant submits that the General Division made several errors.

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.

(a) Alleged failure to observe a principle of natural justice

[5] The Applicant submits that the General Division failed to observe a principle of natural justice. In particular, she alleges that the General Division exhibited bias against her because it mentioned on several occasions that she was obese. As well, the Applicant alleges that the General Division deprived her of her entitlement to a fair hearing, although she did not particularize this claim.

[6] I note that there was correspondence from the Social Security Tribunal to both parties, providing them with ample opportunities to file any supporting evidence and submissions. Both parties availed themselves of this opportunity. There is no indication that the Applicant required further time to obtain additional documentation. I do not see any indication that she was unable or unprepared to proceed with the scheduled hearing, or that she had sought an adjournment of the proceedings to, for instance, secure additional records. The General Division determined that a teleconference hearing was appropriate. The Applicant attended the proceedings, as did three witnesses. The Applicant and each of the witnesses testified. I do not see any indication that the General Division denied the Applicant the opportunity to fully and fairly present her case.

[7] There were four separate occasions where the General Division mentioned that the Applicant was obese, namely:

- at paragraph 13, when it wrote, “This lady is really quite immobile and is morbidly obese […] Her past medical history is remarkable for issues with ongoing morbid obesity”;
- at paragraph 14, when it wrote, “Dr. Burkart states that on examination, the [Applicant] is a flushed, morbidly obese female”; and
- at paragraph 15, when it wrote that, “The [Applicant] is well aware of the complex nature of the intended procedure and she is at best a poor surgical candidate primarily because of her severe and morbid obesity […]”

[8] However, the references to the Applicant's obesity reflect her orthopaedic surgeon's opinion, and the references appear in only the General Division's evidence section. For instance, in his report of August 31, 2015, the orthopaedic surgeon wrote that "she is morbidly obese as well" and that her past medical history was remarkable for issues with ongoing morbid obesity (GD3-1 to GD3-2). Given that the references accurately reflect the orthopaedic surgeon's opinion, and given that his report was one of the primary reports upon which the Applicant relied to advance her appeal, I do not find that the General Division exhibited any bias. The General Division simply could not ignore this evidence, given its materiality.

[9] In fact, despite the Applicant's allegations of bias, the General Division neither specifically referred to nor considered the Applicant's obesity in its analysis, ultimately finding instead that, because she had been engaged in a substantially gainful occupation after the end of her minimum qualifying period had passed, she could not have met the definition of "severe" as defined by the *Canada Pension Plan*. The General Division noted her evidence in this regard at paragraph 10, that she was working 20 hours per week in March 2015 and that a Record of Employment issued on June 12, 2015 stated that she was employed until June 2015, when she quit due to health reasons. The Applicant does not dispute that she continued to be employed in a substantially gainful occupation after her minimum qualifying period had passed, despite her health challenges, and I fail to see any evidence to suggest that this had not been the case.

(b) Alleged erroneous finding of fact

[10] The Applicant further submits that the General Division based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it, although she did not identify any alleged erroneous findings of fact. She argues that there are "inherent limitations of a single perspective on a complex case" and for this reason requests "a new set of eyes" to review her situation, i.e. a *de novo* hearing.

[11] Essentially, the Applicant disagrees with the General Division's assessment and interpretation of the medical evidence and is urging me to conduct my own assessment.

Some measure of deference is owed to the General Division. As the primary trier of fact, it is best-positioned to assess and make findings on the evidence and determine whether, after considering the medical evidence on a cumulative basis, it could lead to a finding that an appellant's disability was severe and prolonged on or before the end of her minimum qualifying period and that it is likely to be long continued and of indefinite duration or likely to result in death. Furthermore, subsection 58(1) of the DESDA provides for only limited grounds of appeal. It does not allow for a reassessment or *de novo* hearing of the evidence: *Tracey*.

[12] I have also reviewed the hearing file, with a view to comparing it to the General Division's decision. Having done so, I am satisfied that the member did not overlook or possibly misconstrue any important evidence.

CONCLUSION

[13] Given the foregoing considerations, the application for leave to appeal is refused.

Janet Lew
Member, Appeal Division