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

Citation: *C. B. v. Minister of Employment and Social Development,* 2017 SSTADIS 508

Tribunal File Number: AD-17-334

BETWEEN:

C. B.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: September 29, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated January 19, 2017. The General Division had earlier conducted a hearing by videoconference and determined that the Applicant was ineligible for the disability benefit under the *Canada Pension Plan* (CPP) because her disability was not "severe" during her minimum qualifying period (MQP), which ended on December 31, 2016.

[2] On April 20, 2017, within the specified time limitation, the Applicant submitted an incomplete application requesting leave to appeal to the Appeal Division. Following two requests for additional information, the Applicant completed her appeal on May 19, 2017.

ISSUE

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

THE LAW

Department of Employment and Social Development Act

[4] According to subsections 56(1) and 58(3) of the DESDA, an appeal to the Appeal Division may be brought only if leave to appeal is granted. Furthermore, the Appeal Division must either grant or refuse leave to appeal. 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.

[5] According to subsection 58(1) of the DESDA, 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 made in a perverse or capricious manner or without regard for the material before it.

[6] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for an applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, an applicant does not have to prove the case.

[7] The Federal Court of Appeal has concluded that the question of whether a party has an arguable case at law is akin to determining whether that party, legally, has a reasonable chance of success—*Canada v. Hogervorst*;[1] *Fancy v. Canada.*[2]

Canada Pension Plan

[8] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) be under 65 years of age;
(b) not be in receipt of the CPP retirement pension;
(c) be disabled; and
(d) have made valid contributions to the CPP for not less than the MQP.

[9] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[10] Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if they are incapable

[1] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.

SUBMISSIONS

[11] In the application requesting leave to appeal to the Appeal Division, dated April 20, 2017, the Applicant's authorized representative expressed disagreement with the denial of benefits and alleged that the General Division had not properly considered the submitted information.

[12] On April 24, 2017 and again on May 11, 2017, the Tribunal advised the Applicant in writing that her application put forward insufficient grounds. In a letter dated May 17, 2017, the Applicant's representative made the following points:

- At page 71 of the CPP file, there are clinical notes from Dr. Sagi, dated September 18, 2014, which state that the Applicant has major depression. Based on these findings, the General Division should have been allowed her appeal.
- The independent psychiatric examination dated February 10, 2015 states that the Applicant is totally disabled. Unfortunately, for reasons unknown, this report was not previously provided to the Tribunal. Had the General Division questioned the Applicant about her prior psychiatric examinations, as part of its information seeking mandate, it would have discovered that the report existed. It was obliged to do so and then seek out that report prior to issuing a decision.

[13] The Applicant also included with her submissions copies of the following documents:

- medical report by Eli Sagi, psychiatrist, dated September 11, 2014
- medical information form from Morneau Shepell and completed by Dr. Sagi on September 30, 2014
- clinical Notes of Dr. Sagi dated March 2, 2015
- medical report by Dr. Sagi dated March 21, 2017

- fragment of an independent psychiatric examination by Velan Sivasubramanian dated February 10, 2015

ANALYSIS

Allegation that General Division Ignored Evidence

[14] The Applicant suggests that the General Division dismissed her appeal despite medical evidence indicating that her condition was "severe and prolonged" according to the criteria governing CPP disability.

[15] However, outside of this broad allegation, the Applicant has not identified how, in coming to its decision, the General Division failed to observe a principle of natural justice, committed an error in law or made an erroneous finding of fact. My review of the decision indicates that the General Division analyzed in detail the Applicant's medical conditions—predominantly chronic pain and depression—and how they affected her capacity to regularly pursue substantially gainful employment. In doing so, the General Division took into account the Applicant's education and employment history before concluding that there was insufficient evidence of incapacity as of December 31, 2016. The General Division's decision closed with an analysis that suggests it meaningfully assessed the evidence and had defensible reasons supporting its conclusion. I see no indication that the General Division ignored, or gave inadequate consideration to, any significant component of the evidence that was before it.

[16] The Applicant specifically alleges that the General Division disregarded Dr. Sagi's finding that she suffered from depression. In fact, the General Division's decision made explicit reference (at paragraph 23) to the September 18, 2014 clinical note in which Dr. Sagi diagnosed the Applicant with major depression and again addressed it in its analysis proper. The General Division was well aware that the Applicant had been diagnosed with depression, but diagnosis does not equate with disability, as was held in *Klabouch v. Canada*,[3] and it is not inevitable that a medical condition identified prior to the end of an MQP must eventually result in incapacity.

[17] The Applicant also suggests that the General Division had an obligation to actively seek out evidence that it should have perceived was missing in the file—for example, the report that

[3] *Klabouch v. Canada (Minister of Social Development)*, 2008 FCA 33.

emerged from a February 2015 independent psychiatric examination. This misunderstands the Tribunal's function. Ultimately, the burden of proof lies with the Applicant to prove her case, on a balance of probabilities, rather than with the Respondent or the Tribunal to prove that the Applicant is disabled or otherwise.[4] There is no duty on the Tribunal to solicit evidence, as indicated by subsection 68(1) of the *Canada Pension Plan Regulations*, which states that an applicant for benefits "*shall* supply the Minister [my emphasis]" with documents relating to his or her disability. The history of this proceeding indicates that the Applicant and her representative had ample time in which to submit medical evidence documenting her claimed disability. The Applicant ultimately submitted dozens of reports amounting to more than 300 pages and, putting aside the General Division's statutory obligations, it would not have been reasonable in this case to expect the presiding member to identify "missing" documents in the file and then take positive steps to obtain them.

[18] I see no arguable case for the grounds claimed by the Applicant.

Submission of New Documents

[19] The Applicant also submitted a number of medical reports with, and after, her application for leave to appeal. Some had already been presented to the General Division; others were not or were prepared after the issuance of its decision. I am unable to consider any of them, given the constraints of subsection 58(1) of the DESDA, which confers no authority on the Appeal Division to assess the merits of disability claims. Once a hearing has concluded, there is a very limited basis upon which any new or additional information can be raised. An applicant could consider making an application to the General Division to rescind or amend its decision. However, an applicant would need to comply with the requirements set out in section 66 of the DESDA, as well as those set out in sections 45 and 46 of the *Social Security Tribunal Regulations.* Not only are there strict deadlines and requirements that must be met to succeed in an application to rescind or amend, but an applicant would also need to demonstrate that any new facts are material and that they could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

[4] *Dhillon v. Minister of Human Resources Development* (November 16, 1998), CP 5834 (PAB).

CONCLUSION

[20] As the Applicant has not identified any grounds of appeal under subsection 58(1) of the DESDA that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.

Member, Appeal Division