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

Citation: *H. T. v. Minister of Employment and Social Development*, 2017 SSTADIS 525

Tribunal File Number: AD-16-1335

BETWEEN:

H. T.

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: October 10, 2017

REASONS AND DECISION

INTRODUCTION

[1] On October 20, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* was not payable. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on November 30, 2016. The General Division found that the Applicant did not prove, on a balance of probabilities, that she was "incapable regularly of pursuing any substantially gainful occupation at the date of the hearing." The Applicant's minimum qualifying period (MQP) ends on December 31, 2017.

ISSUE

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

THE LAW

Leave to Appeal

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

[4] 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

[5] According to s. 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 that it made in a perverse or capricious manner or without regard for the material before it.

SUBMISSIONS

[6] The Applicant submits that the General Division made a series of erroneous findings of fact in a perverse or capricious manner and without regard to the material before it, and that the General Division erred in law in making its decision.

[7] The Applicant argues, *inter alia*, that the General Division improperly disregarded all independent medical assessment reports on the record that found the Applicant unable to work in any occupation. The Applicant's submission refers to the failure to apply any weight whatsoever to these reports as a failure to observe the principles of procedural fairness and as an error in law.

BACKGROUND

[8] The Applicant was in a car accident and stopped working in April 2012. The MQP date is December 31, 2017, so the General Division reviewed documentary medical evidence to determine whether the Applicant had a severe disability as of the date of the hearing in October 2016. The General Division's decision provides a review of the available documentary medical evidence, including reports from both treating physicians and independent assessors.

[9] The following are the treating physician reports:

- Dr. Martino (family physician), medical note, June 6, 2013 (para. 8);
- Dr. McMaster (psychologist), report to insurer, September 23, 2013, and other brief clinical notes up to June 2015 with "very limited updating information" (para.9);
- Dr. Martino, referral to pain clinic, October 2013 (para. 10);
- Dr. Martino, medical report, April 14, 2014 (para. 12); and
- Dr. Olisa follow-up report, April 10, 2015, and further report in May 2015 (para. 17).

[10] The following are the assessments:

- Dr. Garber (psychologist) clinical psychological exam at request of the Applicant's representative on April 1, 2014. The decision noted that Dr. Garber indicated that the Applicant was, "totally disabled from any form of employment or any form of vocational retraining now or in the foreseeable future" (para. 11);

- Dr. Gnam (psychiatrist) exam for the long term disability insurer May 29, 2014 (para. 13). The decision noted that Dr. Gnam concluded that the Applicant's mental impairments were, "at a moderate or moderate to severe level and that she was not capable of engaging in any employment which she would be suited by education training or experience" (para 13);

- Functional Capacity Evaluation, prepared for the insurer, June 11, 2014 (para. 14);

- Catastrophic Impairment Evaluation on request of the Applicant's representative, dated September 2, 2014 (para. 15);

- Dr. Berbrayer (physiatrist) physiatric medico-legal evaluation, October 27, 2014. The decision noted that Dr. Berbrayer concluded that the Applicant was "limited in performing the heavier and more repetitive household tasks and that her injuries impacted her ability to earn a living in her chosen profession" (para. 16);

- Dr. Soric (physiatrist) independent physiatry assessment report prepared for the long term disability insurer, September 29, 2015. The decision noted that Dr. Soric suspected "significant psychological and emotional problems but deferred to the opinion of others. He felt that she was not capable of returning to work, however, this was not primarily due to physical factors but as a result of psychological and emotional issues. The prognosis for her physical symptoms as favourable but he could not comment on the psychological or emotional difficulties" (para. 18); and

- Dr. Clewes (psychologist) independent psychological evaluation for the insurer conducted on November 10, 2015. The decision notes that Dr. Clewes found "that at that time, the Appellant suffered from a complete inability to engage in employment.

She noted that it was difficult to predict whether her psychological symptoms would resolve and impossible to predict whether they are temporary or permanent" (para. 19).

[11] In its analysis, the General Division stated (at para. 42) that the Applicant relied on, "a number of psychological evaluations which conclude that she was incapable of returning to work, including the most recent in November 2015 by Dr. Clewes."

[12] Paragraph 43 of the General Division's decision states as follows:

> While the assessments can be helpful, they are generally one time visits to assist in determining entitlement to a specific insurance scheme and are not as valuable to this Tribunal as reports from the medical professionals treating her on a regular basis. The last report from Dr. McMaster is now three years old and indicated, at that time, that there were just two issues remaining, there are no current reports from Dr. McMaster to rely on and the Appellant has also reported that she had chosen to discontinue seeing her psychiatrist about a year ago.

[13] The General Division then provided some reasons for why it found the Applicant's own evidence "somewhat unreliable" (para 44).

[14] The General Division stated that, "the most recent medical evidence provided suggests that the Appellant has some physical capacity to work as the only physical restrictions appear to be some accommodation required with sitting" (para. 48). The General Division referenced the Applicant's evidence about her activities of daily living, and then indicated, "She has not been under psychiatric care for over a year and there are no current reports from her psychologist suggesting otherwise. The Tribunal finds the lack of this medial evidence significant in its decision" (para 48).

ANALYSIS

[15] The Applicant raised a ground under s. 58(1)(*c*) of the DESDA that has a reasonable chance of success on appeal.

[16] The Applicant alleges that the General Division disregarded independent medical assessments that indicate that the Applicant was unable to work in any occupation. The omission of relevant evidence that goes to the heart of an applicant's claim (medical evidence

that supports a severe disability) raises an arguable case as to whether the General Division made erroneous findings of fact in a perverse and capricious manner or without regard to the materials before it [see *Joseph v. Canada (Attorney General)*, 2017 FC 391, paras. 48 and 72].

[17] In the "Evidence" section of the reasons, the General Division described the content of several independent medical assessments that went to the heart of the Applicant's claim; they described her psychological, psychiatric and physical functioning. These reports expressed opinions about her ability to work in light of restrictions (namely, reports from Dr. Garber, Dr. Gnam, Dr. Berbrayer, Dr. Soric, and Dr. Clewes). Each of these reports was dated either 2014 or 2015. The Applicant applied for the disability pension in July 2015, the hearing was in October 2016, and the MQP date is December 31, 2017.

[18] In its analysis, the General Division indicates in what appears to be a general way that independent assessments "can be helpful," characterizes them generally as arising from one time visits, indicates that they are produced for a purpose relating to entitlement under insurance schemes, and concludes that they are not "as valuable" to the Tribunal as reports from treating physicians.

[19] The General Division indicates that the assessments *can* be helpful, but does not indicate whether they were considered in its assessment of disability. The General Division does not provide an analysis of how helpful many of the Applicant's specific assessments were in the Applicant's case or why. The General Division does not clearly explain why, in the Applicant's case specifically, these assessments may not have been as valuable as reports from treating physicians.

[20] The General Division is not clear about how or why the original purpose of the assessments impacts their helpfulness or value generally, or in this specific case. For example, it is not clear why independent assessments produced for a long term disability insurer for the purpose of determining whether an applicant can work in any occupation (after the initial two-year period of receiving long term disability benefits) are less helpful than reports from treating physicians. The Applicant submits in the request for leave to appeal that the tests for these two benefits are similar.

[21] The General Division's conclusion at paragraph 48 indicates that, "the most recent medical evidence provided suggests that the Appellant has some physical capacity to work as the only physical restrictions appear to be some accommodation required with sitting" (para. 48). This may be a reference to Dr. Soric's independent assessment of September 2015, which appears to be one of the assessments originally created for insurance-related purposes. The Applicant had a history of medical information about her psychiatric/psychological health that included an assessment by Dr. Clewes dated November 2015, a month after Dr. Soric's assessment. Dr. Clewes' November 2015 report concluded that the Applicant suffered from a "complete inability to engage in employment." Given Dr. Soric and Dr. Clewes both wrote reports in the fall of 2015, it is unclear why Dr. Soric's report was sufficient recent for the General Division to rely on, but it seems that Dr. Clewes' report was not.

[22] It is arguable that the General Division ignored the medical evidence about the Applicant's psychiatric/psychological health from assessors in 2014 and 2015 that went to the heart of the Applicant's case. There is no reference to the content of the assessments of Dr. Garber, Dr. Gnam, and Dr. Berbayer in the analysis component of the decision although they go to the heart of the Applicant's case. The General Division did express a general preference instead for evidence from treating physicians closer to the date of the hearing, evidence that was not available to the Tribunal. This does not seem to be a situation in which the General Division weighed the evidence from treating physicians and assessments and found the evidence from the assessments themselves lacking in some way [such a weighing would be afforded deference by the Appeal Division see *Bellefeuille v. Canada (Attorney General)*, 2014 FC 963 and *Hussein v. Canada (Attorney General)*, 2016 FC 1417].

[22] The Applicant need only show an arguable case in order for leave to appeal to be granted. The Applicant has an arguable case that evidence about her psychiatric/psychological functioning from 2014 and 2015 that went to the heart of her case was ignored and that the General Division's finding of fact about her capacity to work was therefore made in a perverse or capricious manner or without regard for the material she filed.

[23] The Appeal Division does not need to consider any other submissions or grounds raised by the Applicant at this time. Subsection 58(2) does not require that individual grounds of

appeal be considered and accepted or rejected [see *Mette v. Canada (Attorney General)*, 2016 FCA 276].

CONCLUSION

[24] The Application is granted. This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Kate Sellar
Member, Appeal Division