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

Citation: *B. R. v. Minister of Employment and Social Development*, 2017 SSTADIS 535

Tribunal File Number: AD-17-349

BETWEEN:

B. R.

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: October 15, 2017

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated February 2, 2017. The General Division had earlier conducted a hearing by videoconference and determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP), because it found that her disability was not "severe" prior to her minimum qualifying period (MQP), which ended on December 31, 2010.

[2] On April 26, 2017, within the specified time limitation, the Applicant's authorized representative submitted an application requesting leave to appeal to the Appeal Division.

THE LAW

[3] According to subsections 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. The Appeal Division must either grant or refuse leave to appeal.

[4] 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.

[5] 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.

[6] Some arguable ground upon which the proposed appeal might succeed is needed for leave to appeal to be granted: *Kerth v. Canada.*[1] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[7] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for the 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, the Applicant does not have to prove the case.

ISSUE

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

SUBMISSIONS

[9] In the application requesting leave to appeal, the Applicant's representative made the following submissions:

(a) The General Division ignored overwhelming evidence that, since her February 2010 motor vehicle accident (MVA), the Applicant had continuously suffered from a severe and prolonged disability.

(b) Specifically, the General Division failed to consider relevant medical reports, among them:

- Dr. J. Brunshaw's psychological report dated August 11, 2010;
- Dr. R. Alpert's orthopedic report dated August 30, 2012; and
- Dr. C. Rosenblatt's functional examination report dated January 17, 2014.

In its decision, the General Division appeared to base its conclusion on the fact that there were no reports prior to the December 31, 2010 MQP date that specifically ruled out a return to work for the Applicant. However, there is

[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ no 1252 (QL).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

> nothing that requires all documentation supporting entitlement to CPP disability benefits to be dated prior to the MQP date. As noted in the medical reports cited above, all the Applicant's medical issues stemmed from the February 2010 MVA, and they prevented her from returning to work in any capacity.

ANALYSIS

[10] The Applicant alleges that the General Division failed to consider relevant medical evidence, but I see no arguable case that it did.

[11] In paragraphs 15 and 16 of its decision, the General Division reviewed the Brunshaw report and later relied upon it in its analysis, noting that nothing in it specifically ruled out substantially gainful work as of the MQP.

[12] Similarly, the General Division fairly and comprehensively summarized the Alpert report in paragraphs 28-34 of the decision and discussed it at length in paragraphs 62 and 63. The General Division noted that Dr. Alpert was engaged to assess whether the Applicant suffered from "a complete inability to engage in any employment for which she is reasonably suited by education, training or experience." The General Division noted that this test, established under Ontario's *Statutory Accident Benefits Schedule*, differed significantly from the definition of disability set out by the CPP. For that reason, it declined to "place great reliance" on it.

[13] It is open to an administrative tribunal to sift through the relevant information, assess the quality of the evidence, decide on its weight and determine what, if anything, it chooses to accept or disregard. As the Federal Court of Appeal noted in *Simpson v. Canada*,[3]:

> Assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact […]

[14] As trier of fact, the General Division is within its authority to weigh the evidence as it sees fit, so long as it does not commit a material error of fact and arrives at a defensible

[3] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

conclusion. Here, since the Applicant cannot argue that the General Division ignored the Alpert and Brunshaw reports, her proposed grounds amount to no more than an expression of disagreement with how the General Division weighed them, relative to competing evidence.

[15] In the absence of specific grounds of error, the Applicant's appeal is in essence a request to retry the entire claim. If the Applicant is requesting that I reconsider and reassess the evidence and substitute my judgment for the General Division's in her favour, I am unable to do this, especially, as in this case, the General Division has offered defensible reasons for discounting the reports in question.

[16] As for Dr. Rosenblatt's functional examination report dated January 17, 2014, I could see no indication in the record that it was ever made available to the General Division. I note that, on August 30, 2016, the Applicant's representative filed a submission with the Tribunal containing a brief and three reports, which included the Brunshaw and Alpert reports, as well as an earlier 18-page document by Dr. Rosenblatt, entitled "Section 42.1 Rebuttal / Clinical Functional Examination" and dated September 22, 2010. The General Division duly addressed this last report at paragraphs 18-22 of its decision and again at paragraphs 61 and 67, but it cannot be faulted for failing to consider evidence to which it did have access, even if, as seems likely, the Applicant's representative incorrectly assumed that both Rosenblatt reports had been submitted. In any case, although they were prepared nearly three-and-a-half years apart, there appears to be considerable overlap between the two reports because they shared the same author.

CONCLUSION

[17] 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